NO. 76-6528

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1976

Apr 11 77

DAVID WAYNE BURKS, Petitioner

-vs-

UNITED STATES OF AMERICA

* * * * *

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

* * * * *

Bart C. Durham, III
Attorney for Petitioner
1104 Parkway Towers
Nashville, Tennessee 37219

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-6528

DAVID WAYNE BURKS, Petitioner

-vs-

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

David Wayne Burks petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. A, infra) not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on December 30, 1976. On February 8, 1977, the court of appeals denied petitions for rehearing filed by both Mr. Burks and the United States (App. B & C, respectively, infra). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the double jeopardy clause of the Fifth Amendment to the Constitution prohibits the government from presenting additional evidence to carry its burden on the issue of defendant's sanity, when the government failed to do so at a previous trial at which jeopardy had attached?

2. Whether the discretionary powers of an appellate court pursuant to Title 18 U.S.C. §2106 extend to direct on remand a course of action which is prohibited by the double jeopardy clause of the Fifth Amendment to the Constitution?

3. Whether a defendant's motion for new trial effectively acts as a waiver for constitutional protection afforded by the double jeopardy clause of the Fifth Amendment when a previous motion for judgment of acquittal was erroneously denied?

STATEMENT

The petitioner was tried and convicted of armed bank robbery in the United States District Court for the Middle District of Tennessee and sentenced to twenty years imprisonment under 18 U.S.C. 4208(a)(2). At the close of all the trial testimony, counsel for defendant made an oral motion for a directed verdict of acquittal which was denied by the court. A timely motion for new trial was filed on behalf of the defendant on March 3, 1976, and was denied by the Honorable Judge Gray on March 12, 1976. Notice of appeal to the United States Court of Appeals for the Sixth Circuit was timely filed on behalf of the defendant to invoke the appellate jurisdiction of the Court of Appeals pursuant to Title 28 U.S.C. §1291. The Honorable Judges Weick, Lively and Cecil for the Sixth Circuit presided on the appeal and entered their opinion and judgment on December 30, 1976 (App. A). The entry of judgment by the appellate court, obtained by viewing the evidence presented and proper inferences therefrom in the light most favorable to the

government, was that " . . . the judgment of conviction must be reversed."

The Sixth Circuit judgment contends that, "since Burks made a motion for a new trial this court has discretion in determing the course to direct on remand." The Sixth Circuit concluded that, " . . . the interest of justice will best be served in the present case by remanding to the District Court for a determination of whether a directed verdict of acquittal should be entered or a new trial ordered." As a guide for the district court on remand the appellate court adopted the standards and procedures outlined by the Fifth Circuit in United States v. Bass, 490 F. 2d 846, (5th Cir. 1974) quoting the applicable content of Bass (supra at 852-53).

> "We reverse and remand the case to the District Court where the defendant will be entitled to a directed verdict of acquittal unless the government presents sufficient additional evidence to carry its burden on the issue of defendant's sanity. As we noted earlier, the question of sufficiency of the evidence to make an issue for the jury on the defense of insanity is a question to be decided by the trial judge. * * * If the District Court sitting without the presence of the jury, is satisfied by the government's presentation, it may order a new trial. * * * Even if the government presents additional evidence, the district judge may refuse to order a new trial if he finds from the record that the prosecution had the opportunity fully to develop its case or in fact did so at the first trial."

Throughout the proceedings the United States government in its prosecution of the present case did not voice, indicate, or infer that it was, at any time, unfairly prevented from producing competent evidence to carry its burden of proving sanity once a prima facie defense of insanity has been raised.

REASONS FOR GRANTING THE WRIT

I. The judgment of the Court of Appeals for the Sixth Circuit conflicts with applicable decisions and opinions of this Court concerning the double jeopardy clause of the Fifth Amendment to the Constitution.

The United States Court of Appeals for the Sixth Circuit reversed the conviction in this case because of the insufficiency of evidence

to make a question for the jury and to support the conviction.

The appellate court noted that the government has the burden of proving sanity once a prima facie defense of insanity has been raised, and in its appellate review of the evidence presented and the proper inferences therefrom in the light most favorable to the government they,

> ". . . found no evidence which effectively rebutted the specific testimony of three expert witnesses with unchallenged credentials. Thus the judgment of conviction must be reversed."

Subsequent to the appellate decision that the conviction must be reversed they adopted the standards and procedures outlined by the Fifth Circuit as a guide for the District Court to follow on remand.

> "We reverse and remand the case to the District Court where the defendant will be entitled to a directed verdict of acquittal unless the government presents sufficient evidence to carry its burden on the issue of defendant's sanity." United States v. Bass, 490 F. 2d 846, 852 (5th Cir. 1975).

The condition of this remand even though guised under the authority of Title 28 U.S.C. §2106 allowing the appellate court to,

> ". . . direct the entry of such appropriate judgement, decree or order or require such further proceedings to be had as may be just under the circumstances.",

is conflicting with recent applicable decisions and opinions made by this Court concerning constitutional protection afforded by the double jeopardy clause of the Fifth Amendment to the Constitution.

Mr. Chief Justice Burger, delivering the opinion of this Court in Serfass v. United States, 420 US 377, noted,

> ""The constitutional prohibition against 'double jeopardy' was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense . . . the underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual . . . . ""
> --Green v. United States, 355 US 184

In another opinion of this Court expressed by Mr. Justice Marshall in United States v. Wilson, 420 US 332, this Court recognized that when a defendant has been acquitted of an offense, the double jeopardy clause of the Fifth Amendment to the Constitution,

". . . guarantees that the State shall not be permitted to make repeated attempts to convict him. . ."

The appellate court in this case made the determination upon their review that there was insufficient evidence necessary to make a jury question or to support the conviction. Subsequently they reversed the conviction and in their remand relied on a statement that was tantamount to a judgment of acquittal when they ascertained that the appellant will be " . . .entitled to a directed verdict of acquittal . . .", United States v. Bass, supra at 852, but they went further in their directions on remand to stipulate,

". . . unless the government presents sufficient additional evidence to carry its burden on the issue of defendant's sanity." United States v. Bass, supra at 852.

The concurring opinion of Mr. Justice Reed in Bryan v. United States, 338 US 552, suggesting sending the case to the district court to decide whether a judgment of acquittal should be entered or a new trial ordered was obviously a determining factor of the course to direct on remand by the appellate court in the present case since it used Bryan as authority.

The Sixth Circuit Court of Appeals has admitted that,

" Bryan teaches us that in a criminal case, though the government has failed to present a prima facie case, it may have a second chance if the court of appeals determines that that course would 'just under the circumstances.'" --United States v. Smith, 437 F.2d 538, 542 (6th Cir. 1970)

But the Sixth Circuit has also just as readily admitted,

"Disposition is a matter of discretion of which course would better serve the ends of justice, this hinges in our view on whether the government was unfairly prevented from producing competent evidence." --United States v. Smith, supra, at 542.

In 'Smith', supra at 542, there were instances that substantiated that the government was unfairly prevented from producing competent evidence. But in the present case this 'hinge' that the Sixth Circuit spoke of in Smith to allow disposition to better serve the ends of justice, is non-existent. There is nothing in the present case which would imply or infer that the government was unfairly prevented from producing competent evidence or that they were prohibited from having the opportunity to fully develop their case

at the first trial, yet the Sixth Circuit indiscriminately applied their previous standards of Smith to the present case where they are clearly not applicable. By doing so they have extended their discretionary powers pursuant to Title 28 U.S.C. §2106 unconstitutionally, and their direction on remand clearly conflicts with previous decisions by this Court concerning the doctrine against retrials as the core of the double jeopardy clause of the Fifth Amendment to the United States Constitution. Breed v. Jones, 421 US 519; United States v. Jenkins, 420 U.S. 358; United States v. Wilson, 420 U.S. 332 340-343, 95 S. Ct. 1013, 1021-22, 43 L. Ed. 2d 232 (1975); United States v. Jorn, 400 U.S. 470, 479, 91 S. Ct. 547, 27 L. Ed. 2d 543 (1971).

II. The judgment of the Sixth Circuit Court of Appeals conflicts with other appellate courts on similar matters, and the uncertain and dissimilar decisions among the appellate courts would call for an exercise of this Court's supervision.

After viewing the evidence and the proper inferences therefrom in the light most favorable to the government, the Sixth Circuit Court of Appeals in the present case determined that there was insufficient evidence to support the conviction and stated,

"Thus, the judgment of conviction must be reversed."

The difficulty of determining what course the appellate courts should direct on remand, following a reversal because of insufficient evidence, was recognized by the Fifth Circuit:

"The only remaining question is whether the appellant is to be retried. Whether, and under what circumstances, a court of appeals should permit an accused to be retried when his conviction has been reversed for lack of evidence to support the verdict is a question of some uncertainty."
--United States v. Musquiz, 445 F. 2d 963, 966 (5th Cir. 1971)

Judge Leventhal for the Court of Appeals of the District of Columbia also recognized the inherent constitutional questions raised by this situation and described in some length the reasoning and actions that are taken by appellate courts when faced with this problem, and described the problems, discrepancies, and inconsistencies, among the appellate courts. United States v. Wiley, 517 F. 2d 1212 (1975).

In the present case the appellate court reasoned that,

> "Since Burks made a motion for a new trial this Court has discretion in determining the course to direct on remand."

The District of Columbia circuit in Wiley, supra has said:

> "A fairness approach formulated by Mr. Justice Harlan in United States v. Tateo, 377 U.S. 463, 465-66, 84 S. Ct. 1587, 1589, 12 L. Ed. 2d 448 (1964) has recently been identified by this Court as "the practical justification for the exception" to the double jeopardy clause in cases involving appellate reversals of criminal convictions. However, the applicability of the Tateo approach is in some doubt by reasons of the Supreme Court rulings prior to Tateo which seem to have focused on a waiver type approach, indicating that the double jeopardy clause prevents retrials in insufficiency cases in general, but permits such retrial where the accused has waived the constitutional guarantee by moving for a new trial. Two circuits have read the admittedly confusing state of the law created by the court's decisions to make the permissibility of retrial depend on whether defendant moved for a new trial. As a matter of jurisprudence, neither the fairness rationale nore the new trial waiver approach appear to provide a sound basis for subject defendants, who were wrongfully denied a judgment of acquittal by the district court, to a new trial."
>
> --United States v. Wiley, 517, F 2d 1212, 1216-17 N. 20-24 (D.C. Cir. 1975)

In the present case the trial judge obviously wrongfully denied the appellant a directed verdict of acquittal by virtue of the appellate courts reversal for insufficiency of evidence.

The appellate court contends that since the appellant made a motion for new trial the discretion to direct on remand is theirs.

Compounding the problem is the fact that the appellant's motion for directed verdict of acquittal was made prior to and distinct from a later motion for new trial.

In this instance the appellant would draw an analogy with a previous opinion by this Court. Green v. United States, 355 U.S. 184, 192, 78 S. Ct. 221, 2 L. Ed. 2d 199 (1957). In Green, this Court found that a defendant convicted of a serious crime, "has no meaningful choice" but to appeal his conviction, and that such appeal cannot properly be termed a voluntary relinguishment of the defendant's constitutional protection against double jeopardy.

The present case is analogous with this court's opinion in Green in that the appellant had "no meaningful choice" but to motion for new trial after his motion for directed verdict of acquittal was denied. Any attempt by a defendant to rectify a verdict of conviction that has been wrongly imposed should not be deemed a voluntary relinguishment of constitutional

protection against the double jeopardy clause of the Fifth Amendment to the Constitution.

The District of Columbia Court of Appeals in Wiley continues:

> "In this circuit, that statutory directive (28 U.S.C. §2106) has led us to a number of rulings protecting the accused's interest in an acquittal when the prosecution has failed to present sufficient evidence to go to the jury. The interest is one for the trial judge to vindicate in the first instance under the command of rule 29, Federal Rules of Criminal Procedure. But if the trial judge fails in this assignment, the appellate court will exercise its discretionary authority under section 2106 to provide that protection even if the defendant may have moved in the alternative for a new trial."
>
> --United States v. Wiley, 517 F. 2d 1212, 1218 N. 27, 28 (D.C. Cir. 1975)

It is ironic to note that the Sixth Circuit Appellate Court in this case decided that since the appellant motioned for new trial they had discretion to determine the course to direct on remand, and that one of their case sites for that authority was Wiley, supra. Indeed, the D. C. Circuit in Wiley, supra, proceeded,

> ". . . in view of Wiley's motion for new trial . . ."
> --Wiley at 1218

But Footnote 26 of Wiley shows that,

> "Appellant Wiley did not contend that his second trial violated the double jeopardy clause. We do not consider or decide that constitutional question. . ."

In the present case however, the petitioner Burks does contend that the constitution provisions of the double jeopardy clause of the Fifth Amendment were violated in the Sixth Circuits' directions on remand following a reversal for lack of sufficient evidence.

The government in the present case was not unfairly prevented from establishing a prima facie case by providing competent evidence; the government had the opportunity to fully develop its case at the first trial; the government should not be allowed to present additional evidence for a second trial, when it failed to do so at the first trial when that failure did not stem from any manifest necessity; a motion for new trial should not be viewed as a relinguishment of 'double jeopardy' protection.

Provisions should be established by this Court that the appellate courts can use with certainty and consistency in determining courses to direct on remand from reversal for lack of sufficient evidence.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be granted and an Order entered directing a judgment of acquittal.

Respectfully submitted,

Bart C. Durham, III
Attorney for Petitioner
1104 Parkway Towers
Nashville, Tennessee 37219
Member of the Supreme Court Bar

APRIL, 1977

I hereby certify that a true copy of the foregoing has been mailed to the Solicitor General, U. S. Department of Justice, Washington, D.C. and to the U. S. Attorney, Federal Courthouse, 8th and Broadway, Nashville, Tennessee this 11th day of April, 1977.

Bart C. Durham, III

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-6528

DAVID WAYNE BURKS, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 11, 1977
CERTIORARI GRANTED JUNE 13, 1977

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In the Supreme Court of the United States

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No. 76-6528

DAVID WAYNE BURKS, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

UNITED STATES OF AMERICA
v.
DAVID WAYNE BURKS
No. 75-246-NA-CR

RELEVANT DOCKET ENTRIES

1975	
Nov. 19	Indictment filed. BOD Papers included in file.
Dec. 2	December 1, 1975. Entered. Defendant plea of not guilty. Ordered defendant allowed ten days from this date time within which to file pre-trial motions. Ordered case reset for trial January 15, 1976. Copy to USA. USP. USM. defendant and Attorney Durham.
Dec. 9	Order for Psychiatric Examination entered. Defendant to report to Dr. Farrer December 8, 1975 at 3:00 p.m. Ordered report be made to this Court, with copies to the U.S.A. and Attorney Durham. Att. copy USA. USP. USM. defendant and Attorney Durham and Dr. Farrer.
1976	
Jan. 30	Filed: Government's request for reciprocal disclosure by AUSA Windsor. C/S
Feb. 12	Renewal of Government's Request for Reciprocal Disclosure filed by AUSA Windsor. C/S
Feb. 12	Affidavit in Support of Renewal of Government's Request for Reciprocal Disclosure filed by AUSA Windsor.
Feb. 19	Filed: Note received by Court from jury as follows: "The law that constitutes mental illness that Judge Gray read to us."
Feb. 25	Judgment and Commitment Order of 2/25/76 entered. Plea of not guilty; verdict guilty; imprisonment 20 years; sentence imposed under 18:4208(a)(2), under which defendant may become eligible for parole at such time as Board of Parole may determine. 1 Certified copy to

	USA, USP, Attorneys Durham and Moon and defendant; 2 certified copies to USM, 2/25/76.
March [illegible]	Motion for New Trial filed by Thomas W. Moon for defendant. C/S
March 3	Notice of Appeal filed by Attorney Moon on behalf of defendant. C/S
March 12	Order entered: Defendant's Motion for New Trial DENIED. Copies USA, USM, USP, Defendant and Attorney Durham 3/15/76.
Apr. 16	Excerpts from official transcript of proceedings on February 17-19, 1976.
Dec. 30	Opinion of the Sixth Circuit Court of Appeals.
1977	
Feb. 8	Order of the Sixth Circuit Court of Appeals denying petition for rehearing filed by the defendant-appellant.
Feb. 8	Order of the Sixth Circuit Court of Appeals denying petition for rehearing filed by the plaintiff-appellee.

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

[Title omitted in printing]

Filed November 19, 1975.

Frank E. Williams
Clerk
by Sherry Williams
Deputy Clerk

INDICTMENT

COUNT ONE

The Grand Jury charges:

On or about October 23, 1975, in the Middle District of Tennessee, DAVID WAYNE BURKS did by force and violence and intimidation take from the person and presence of employees money belonging to and in the care, custody, control, management and possession of the Commerce Union Bank, Nolensville Road Branch, Nashville, Tennessee, the deposits of which were then insured by the Federal Deposit Insurance Corporation, and in committing this offense, the aforesaid DAVID WAYNE BURKS, did assault the said employees of the said Commerce Union Bank, and did put in jeopardy the lives of said employees by the use of a dangerous weapon.

In violation of Title 18, United States Code, Section 2113(d).

COUNT TWO

The Grand Jury further charges:

On or about October 23, 1975, in the Middle District of Tennessee, DAVID WAYNE BURKS, in committing the offense charged in Count One of this indictment and in avoiding and attempting to avoid apprehension, forced Ernest Staggs to accompany him without the consent of the aforesaid Ernest Staggs.

In violation of Title 18, United States Code, Section 2113(e).

A TRUE BILL:
/s/ Robert P. Alvisder
ROBERT P. ALVISDER
Foreman

/s/ Joe B. Brown
JOE B. BROWN
Acting United States Attorney

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

[Title omitted in printing]

Frank E. Williams
Clerk
by Sherry Williams
Deputy Clerk

Came the Assistant United States Attorney and also came the defendant David Wayne Burks, in person, and by his attorney Bart Durham III, and upon being solemnly arraigned upon an indictment charging in one count violation of 18 U.S.C. §§ 2113(d) and 2113(e), said defendant pleaded not guilty by reason of insanity to the one-count indictment.

It is ORDERED that the defendant herein be allowed ten (10) days from this date time within which to file pretrial motions.

It is further ORDERED that this case be reset for trial at 9:00 A.M., Thursday, January 15, 1976, in United States District Courtroom Annex-1, United States Court House, 801 Broadway, Nashville, Tennessee.

ENTER:

/s/ Frank Gray, Jr.
FRANK GRAY, JR.
Chief Judge

[Approved by counsel]

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

[Title omitted in printing]

Frank E. Williams
Clerk
by Sherry Williams
Deputy Clerk

ORDER FOR PSYCHIATRIC EXAMINATION

Upon motion of the United States of America for psychiatric examination of the defendant;

It is hereby ORDERED pursuant to Title 18, United States Code, Section 4244, and the inherent powers of this Court, that the defendant be examined by a qualified psychiatrist at the expense of the United States in order to determine his present medical condition as to his ability to understand the proceedings against him and to assist his attorney in his own defense, and further to determine (1) whether the defendant was suffering from mental illness at the time of the alleged commission of the crime; (2) whether that illness was such as to prevent his knowing the wrongfulness of his act; (3) whether the mental illness was such as to render him substantially incapable of conforming his conduct to the requirements of the law he is charged with violating.

It is further ORDERED that the defendant shall report to the office of Dr. R. James Farrer, 1 Park Plaza, Nashville, Tennessee, at 3:00 p.m., Monday, December 8, 1975, and at such other times as Dr. Farrer shall designate for the purpose of examination. Failure by the defendant to so appear will be considered by the Court as a violation of the conditions of the defendant's bond.

It is further ORDERED that such psychiatric report be made to this Court, with copies to the United States Attorney and Bart Durham, Esq., 1104 Parkway Towers, Nashville, Tennessee, attorney for the defendant.

ENTER:

/s/ L. Clure Morton
L. CLURE MORTON
Judge

[Approved by counsel]

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

[Title omitted in printing]

Filed January 30, 1976

GOVERNMENT'S REQUEST FOR RECIPROCAL DISCLOSURE

The Court having ordered the defendant examined by a qualified psychiatrist upon the motion of and at the expense of the United States, and having further ordered a copy of the resulting psychiatric report disclosed to defense counsel in the cause, and defense counsel having requested said psychiatric report, the United States Attorney requests disclosure of evidence by the defendant pursuant to *Rule 16(b)(1)(B) of the Federal Rules of Criminal Procedure,* and permission to inspect or photograph any results or reports of physical or mental examinations or tests administered to the defendant in connection with the cause and within the possession or control of the defendant.

CHARLES H. ANDERSON
United States Attorney for the Middle District of Tennessee

/s/ Richard L. Windsor
RICHARD L. WINDSOR
Assistant U.S. Attorney
879 U.S. Courthouse
P.O. Box 800
Nashville, Tennessee 37202
Telephone: (615) 749-5151

[Certificate of Service omitted]

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

[Title omitted in printing]

Filed February 12, 1976

RENEWAL OF GOVERNMENT'S REQUEST FOR RECIPROCAL DISCLOSURE

The Court having ordered the defendant examined by a qualified psychiatrist upon the motion of and at the expense of the United States, and having further ordered a copy of the resulting psychiatric report disclosed to defense counsel in the cause, and defense counsel having requested said psychiatric report, the United States Attorney requests disclosure of evidence by the defendant pursuant to *Rule 16(b)(1)(B) of the Federal Rules of Criminal Procedure,* and permission to inspect or photograph any results or reports of physical or mental examinations or tests administered to the defendant in connection with the cause and within the possession or control of the defendant.

CHARLES H. ANDERSON
United States Attorney for the Middle District of Tennessee

/s/ Richard L. Windsor
RICHARD L. WINDSOR
Assistant U.S. Attorney
879 U.S. Courthouse
P.O. Box 800
Nashville, Tennessee 37202
Telephone: (615) 749-5151

[Certificate of Service omitted]

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

[Title omitted in printing]

Filed February 12, 1976

AFFIDAVIT IN SUPPORT OF RENEWAL OF GOVERNMENT'S REQUEST FOR RECIPROCAL DISCLOSURE

Upon the oath and affidavit of the undersigned Assistant United States Attorney, the following facts are presented to the Court:

1. The attorney for the defendant made a personal telephonic request of the attorney for the Government, on behalf of the defendant, for the results and reports of a psychiatric examination of the defendant, David Burks, by a psychiatrist and, pursuant to the Government's motion for the examination.

2. At the time of the telephonic request, no copy of the requested results of reports of said examination was in the possession or custody of the Government.

3. The attorney for the Government immediately contacted the psychiatrist.

4. No report or result had then been prepared although the examination of David Burks had been completed.

5. The attorney for the Government requested the examining psychiatrist to expeditiously prepare the result or report in typed form and provide it to the attorney for the defendant, and this in fact was done.

6. Furthermore, attached to this affidavit as Exhibit A thereto is a photocopy of a letter from the attorney for the defendant specifically requesting disclosure under *Rule 16 of the Federal Rules of Criminal Procedure.*

7. The attorney for the defendant has refused to comply with the Government's request for reciprocal disclosure of information within the possession or control of the defendant concerning mental or physical examinations.

/s/ Richard L. Windsor
RICHARD L. WINDSOR
Assistant U.S. Attorney

[Jurat Omitted]

EXHIBIT A

MOON & DURHAM
ATTORNEYS-AT-LAW

Tom Moon
Bart Durham

Suite 1104—Parkway Towers
Nashville, Tennessee 37219
Telephone 615/254-5016

November 25, 1975

Received December 1, 1975
U.S. Attorney's Office
Nashville, Tennessee

Mr. Rick Windsor
Assistant U.S. Attorney
U.S. Courthouse
800 Broadway
Nashville, Tn. 37203

Re: United States of America v.
David Wayne Burks,
No. 75-246-NA-CR

Dear Mr. Windsor:

I am writing to request informally from the Office of the United States Attorney the discovery allowed under Rule 16 of the Federal Rules of Criminal Procedure.

I would like to inspect the confession made by the defendant and the results of any scientific tests made in connection with the case including pictures taken at the bank if the government plans to use them. I would also respectfully request those items under Rule 16b; namely, books, papers, documents, tangible objects and other matters which are in the possession, custody or control of the government. These items will be material to the preparation of our defense. If you have any question as to whether or not a display of these would be reasonable, I would be glad to make arrangements to view them in such a manner as to make my request reasonable. I would also like to make this a continuing request for disclosure under Rule 16g.

Respectfully yours,
Bart Durham

Filed February 19, 1976

Frank E. Williams
Clerk
by A. C. Beech
Deputy Clerk

Note received by court from jury
at 5:45 p.m., Feb. 19, 1976.

The law that constitutes mental illness that the Judge Gray read to us.

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

UNITED STATES OF AMERICA v.
DAVID WAYNE BURKS, *Defendant*

Docket No. 75-246-NA-CR

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date, February 25, 1976.

Counsel: With counsel, Bart Durham III and Thomas Moon.

Plea: Not guilty.

Finding & Judgment: There being a verdict of guilty. Defendant has been convicted as charged of the offense(s) of violation of 18 U.S.C. § 2113(d) as charged in count one of the two-count indictment.

(Count two of the two-count indictment was heretofore dismissed by the Court upon motion of the Assistant United States Attorney.)

Sentence or Probation Order: The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant be hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of TWENTY YEARS. It is ORDERED that the sentence be imposed under the provi-

sions of 18 U.S.C. § 4208(a)(2), under which the defendant may become eligible for parole at such time as the Board of Parole may determine.

Received for Entry
2:00 P.M.
Feb. 25, 1976
Frank E. Williams,
Clerk
by Andrea C. Beech
Deputy Clerk

Certified as a True Copy on this date February 25, 1976.
A. C. Beech, *Deputy*.

/s/ Frank Gray, Jr.
FRANK GRAY, JR.
U.S. District Judge

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

[Title omitted in printing]

Filed March 3, 1976

Frank E. Williams
Clerk
by A. C. Beech
Deputy Clerk

MOTION FOR NEW TRIAL

The defendant, David Wayne Burks, would respectfully PRAY for a new trial and would assign as grounds the following errors:

1. The evidence was insufficient to support the verdict.
2. The eyewitness identification of all bank employees should have been suppressed because of the failure of the Government, upon notice, to affirmatively advise the lay witnesses they had the permission of the Government to talk to defense attorneys. The Government let stand a known wrong.
3. Physical evidence connecting the defendant with the crime was wrongfully introduced. The defendant told an FBI agent he wanted to talk to a lawyer. This agent failed to convey the defendant's wishes to a second FBI agent who proceeded to obtain the signature of the defendant to a consent to search form. The first agent had a duty to advise the second agent of the defendant's desire to speak to an attorney.
4. The U.S. Attorney on cross examination elicited the fact that the defendant was released on bond in custody of his parole or probation officer. The Court held this gave the U.S. Attorney the right to go directly into a previous conviction of the defendant for an earlier bank robbery in Ohio.
5. The U.S. Attorney prejudiced the jury by stressing on direct and cross examination the "right-wrong" or "irresistible impulse" test of mental disease rather than the *Smith* rule of the Sixth Circuit. (*United States v. Smith*, 404 F. 2d 720 (1968)).
6. The court restricted examination of one of the chief defense witness to 45 minutes, putting an arbitrary time limit on the defendant, knowing that defense counsel had

given the expert witness, a psychiatrist, his word that he would not be held overnight.

7. The Government failed to observe a reciprocal discovery order and only furnished the defense the results of test data of Dr. Buchanan on the morning of the trial. The Government never furnished the most significant test of all, the Minnesota Multiphasic Personality Inventory Test, and until Dr. Buchanan had testified never furnished the underlying psychological tests upon which his conclusions were based. The defendant was prejudiced because of lack of opportunity for rebuttal.

8. The U.S. Attorney told the jury his personal opinion on the ultimate issue in the case, insanity, when he said, in substance, "Who do you think is crazy, the mother or the defendant? I know it is not the defendant."

9. The term "insanity" used in the charge without an explanation is misleading. The charge failed to stress the rule of this circuit in *Smith*. The charge gave an inadequate definition of a substantial inability to conform ones conduct with the law one is accused of violating.

10. The court refused to allow the defense in closing argument to use a visual aide which would have emphasized the rule of the *Smith* case. The questions, in substance, were:

> (1) whether the defendant was suffering from mental illness at the time of the alleged commission of the crime; (2) whether that illness was such as to prevent his knowing the wrongfulness of his act; (3) whether the mental illness was such as to render him substantially incapable of conforming his conduct to the requirements of the law he is charged with violating.

11. The sentence was excessive in view of all the circumstances and the testimony concerning the defendant.

Respectfully submitted,
MOON & DURHAM

By: /s/ Thomas W. Moon
THOMAS W. MOON
1104 Parkway Towers
Nashville, Tennessee 37219
Phone: 254-5016

[Certificate of Service omitted]

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

[Title omitted in printing]

Filed March 3, 1976

NOTICE OF APPEAL

The defendant, David Wayne Burks, hereby respectfully files this his notice of appeal and appeals the judgment and sentence of the Court convicting him of bank robbery in this case to the U.S. Court of Appeals in the Sixth Circuit.

Respectfully submitted,
MOON & DURHAM

By: /s/ Thomas W. Moon
THOMAS W. MOON
1104 Parkway Towers
Nashville, Tennessee 37219
Phone: 254-5016

[Certificate of Service omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
COLUMBIA DIVISION

[Title omitted in printing]

Frank E. Williams
Clerk
by Judy C. Olive
Deputy Clerk

ORDER

The defendant has filed a motion for new trial.

The first asserted ground is that the evidence was insufficient to support the verdict. This allegation is utterly without merit.

The second ground is the allegation that the eyewitness identification of the defendant by bank employees should have been suppressed because the Government did not affirmatively advise the witnesses that they could talk to defense attorneys. There was no showing that the Government told the witnesses they could not talk with defense attorneys. This ground is also without merit.

The third ground is that the physical evidence connecting the defendant with the crime should have been suppressed because the first F.B.I. agent to talk with the defendant was told by the defendant that he wanted a lawyer and had refused to give his name. The record showed that, subsequently, another F.B.I. agent explained to defendant, in detail, his Constitutional rights, obtained his signature to a consent to search form, and then conducted the search of the automobile in which the defendant was riding when he was apprehended after a high speed chase. The court is of the opinion that no rights of the defendant were violated in this procedure. The defendant was fully advised of his rights, and the fact that he originally refused to make a statement was not a bar to subsequent advice to him of his rights. *Hill* v. *Whealon*, 490 F.2d 629 (6 Cir. 1974).

The fourth ground is the allegation that the United States Attorney, on cross examination, elicited from a witness that the defendant had been released on bond in custody of his parole or probation officer, thus opening up the matter of a previous conviction of the defendant of another bank rob-

bery. The record clearly shows that there was no improper cross examination by the United States Attorney, and the witness, defendant's father, volunteered the information. This ground is without merit.

The fifth ground of the motion is an allegation that the United States Attorney in some way prejudiced the jury in his examination of witnesses on the matter of insanity. The record shows that this ground is without merit.

The sixth ground of the motion is: "The court restricted examination of one of the chief defense witness [sic] to 45 minutes, putting an arbitrary time limit on the defendant, knowing that defense counsel had given the expert witness, a psychiatrist, his word that he would not be held overnight." This is a misstatement of fact. The witness in question had been subpoenaed at Government expense on application of the defendant, an indigent. The court did not limit the time of his examination, and, before the examination began, advised defense counsel and the witness that, if the examination was not completed on the day in which it began, it would be continued on the following morning. The allegation that a defense lawyer had told the witness that he would not be held overnight for testimony on the following day is irrelevant. In addition to the foregoing comments, the record shows that the particular witness was fully examined by defense counsel. This ground is without merit also.

The seventh ground of the motion, relative to the furnishing to the defendant of test data of a psychiatrist who testified on behalf of the Government, is without merit. The court has noted that the motion asserts that the most significant test conducted was the Minnesota Multiphasic Personality Inventory Test. This assertion is contrary to the testimony of the chief defense expert witness to the effect that this test was relatively unimportant. This ground is without merit.

The eighth ground of the motion is the assertion that the prosecuting attorney, in his argument to the jury, advised the jury his personal opinion on the issue of whether or not the defendant was insane. The record shows that the prosecuting attorney commented on the fact that the mother of the defendant, when testifying about the defendant's association with a doll, referred to the doll as "he." He then said, in substance, "Who do you think is crazy—not the

defendant." Assuming that this was an improper statement, the court is of the opinion that it was not so prejudicial to the defendant as to require any action by the court at this time. Defense counsel did not object to the argument when it was made. This ground is without merit.

The ninth ground of the motion is that the court failed to charge the jury properly on the subject of insanity. No objection was made to the charge, and the court is of the opinion that the charge given was accurate and adequate. This ground is without merit.

The tenth ground of the motion is that the court erred in refusing to allow defense counsel, in closing argument, to use a visual aid to emphasize the questions to be decided by the jury on the subject of insanity. The court is of the opinion that this was a matter entirely within its discretion and that its action was not an abuse of that discretion.

The eleventh ground of the motion is that the sentence was excessive. The sentence of twenty years, imposed under the provisions of 18 U.S.C. § 4208(a)(2) was well within the limits provided by the statute, and, in the opinion of the court, very lenient in view of the evidence in the record.

The motion for a new trial is DENIED.

/s/ Frank Gray, Jr.
FRANK GRAY, JR.
Chief Judge

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[63] DIRECT EXAMINATION OF
WILMA JEANE RILING

BY MR. WINDSOR:

Q. Miss Riling, what is your occupation, please?
A. I am a bank teller.
Q. Where?
A. At Commerce Union Bank, Nolensville Road Branch.
Q. Did you work there on October 23rd of last year?
A. Yes, I did.
Q. Were you present when the bank was robbed?
A. Yes, I was.
Q. When did you first become aware that something was happening?
A. I became aware—do you want me to go——
THE COURT: Just tell us what happened. You say the bank robbery occurred. Why do you know that? What happened?
A. We were—the bank wasn't very busy that day. When this man came into the bank instead of coming to the window to be waited on, he walked across the lobby and as he was walking across the lobby my eyes followed him and I thought, well, we were expecting the bank examiners and I thought, well, maybe [64] is the bank examiner.

I thought, gosh, he is coming early, because they usually come late in the day about the time for the bank to close.
Q. Where did the man go?
A. So, I followed him with my eyes and he came all the way through the gate and all the way around and then I turned around like this and that is when I saw the gun.
Q. Where was the gun?
A. He was holding it in his hand and he had gone up to—the assistant manager was standing directly behind me and he had gone up to the assistant manager and had the gun on the assistant manager.

As I looked like this, well, he saw that I saw him. So, he stepped on over to where I was. He gave the assistant manager a plastic bag and then he gave me a plastic bag.
Q. Let me stop you and ask you a question.

Did you watch him as he walked all the way across the lobby?
A. I watched him all the way.
Q. Describe his dress, please.

A. Well, you mean his suit and everything? He was very dressed, very nice.

Q. That is what I wanted to know.

Tell me something else. Did he falter or seem unsteady [65] where he was going in the bank?

A. No.

Q. How did he walk?

A. Just walked straight in and straight on around.

Q. Straight on around?

A. He didn't stop. Around through the gate.

Q. Now, are customers supposed to come through that gate?

A. No, they are not.

Q. So, you didn't think he was a customer, did you?

A. No. I thought he was going to come over so I could wait on him and then when he didn't, of course, I naturally followed him, thinking he was a bank examiner.

They usually always come at the end of the day. He must be early because it was around, a little after 11:00.

Q. Were you ever in fear?

A. Well, after I turned and saw that he had a gun, well, naturally I was. It frightened me.

Q. What happened when you received the plastic bag?

A. He gave me a plastic bag and I was trying to find the opening in the bag.

Q. Was the bag folded up together?

A. It was a little—no. It was a little white plastic bag like you would put in a bathroom wastebasket, one of those little plastic liners.

He gave me that and I was trying to find the opening.

[66] THE COURT: Did he say anything to you when he handed you the plastic bag?

THE WITNESS: He gave me the plastic bag. I was fumbling with it, and I was getting very, very nervous and trying to find the opening and he said—he had the gun on me and he said, I am not going to hurt you. I only want your money.

At that point he started helping me find the opening in the bag and he found the opening and opened up the drawer and he started putting the money into the bag.

Q. Did he put some of the bank money in the bag?

A. Yes.

Q. Did he say anything else?

A. As he was scooping across all my money, he came to one part of it. He said, is this the bomb? Is this the bomb? He said, is this the bomb, and I didn't answer. He said, is this your bomb? And I nodded yes, you know.

Q. Why didn't you speak to him?

A. I was frightened and I didn't speak a word to him.

Q. What did he do with the bomb?

A. He picked it up as he was questioning, when he asked me the first time. He had it in his hand and picked it up and he asked me the second time, and I nodded, yes, and he fumbled with it, you know, to see if it was real money.

He put it back in the drawer. He just sort of put it [67] back on an angle in the drawer.

Q. Tell the jury what that bomb is and what it does, please.

A. It is a little block. It looks like real money. If you pick it up and after it has been off from the pin for three or four minutes it will go off and it is a dye. It is sort of a pink dye. It is tear gas, it stings your eyes and makes everything pink.

Q. Did the man ever ask you anything about marked money, Mrs. Riling?

A. He said something else to me but I was just so nervous I just don't remember exactly what he did say to me when he passed back of me.

He did say another thing when he passed in back of my money, but I can't remember exactly what it was he said. Something about the marked money. He had already had my marked money. He had already picked it up.

So, the back part wasn't my marked money, it was another little device we have.

Q. Did the man act like he knew what he was doing?

MR. MOON: Objection. That is a conclusion.

THE COURT: She can make a conclusion to the best of her ability.

A. What was your question again?

Q. Did this man act like he knew what he was doing?

[68] A. Yes, he did. He was very calm.

Q. Did you see anything from him that would suggest to you in your knowledge or your experience that he was not in touch with reality?

MR. MOON: How is she prepared to answer that? That assumes a definition of reality—assumes what is a part from reality and that is what I have been studying.

THE COURT: Why don't you ask a simple question?

Q. Did the man seem to recognize the surroundings and know what money was and bombs were?

A. Yes.

Q. Did he seem to know what he wanted to do with the money?

A. Yes. He seemed to know what he was doing.

Q. Was there anything unusual about his speech? Did it slur or waiver?

A. No.

Q. Did he stagger or reel about?

A. He did not.

Q. Did he seem to be in control of his body?

A. He was.

Q. What was the last thing you saw him do?

A. The last thing I saw him do was walk out of the bank, and I ran across the lobby to see where he was going, which car he was getting in.

[69] Q. You testified you ran across the lobby. He walked?

A. Well, I waited until he got out of the bank, of course. I watched him. I didn't move until he was out of the bank and he was already going up the walk. And then I went out the lobby to look out the window.

The manager told me to stay away from the window, he might shoot. So, I ran back over to the drive-in so I could get his license number.

Q. Were you able to see him there?

A. Yes. I saw him pass by the drive-in.

Q. How did he pass by?

A. Just drove right by and got down at the end of the street and made a right-hand turn right on out.

Q. What was he driving?

A. He was driving a Yellow Cab.

MR. WINDSOR: Counsel may inquire.

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[98] DIRECT EXAMINATION OF ERNEST STAGGS

BY MR. WINDSOR:

Q. Mr. Staggs, what is your job, please?

A. I drive a Yellow Cab.

Q. Please speak loudly in the direction of the jury so they and His Honor can hear you.

A. I drive a Yellow Cab.

Q. Was that your job in October, 1975?

A. It was.

[99] Q. Do you remember a particular Thursday near the end of the month?

A. Very well.

Q. What happened?

A. I had my cab taken.

Q. What time of day?

A. Roughly around 11:00.

Q. How did it happen? Tell us about the encounter you had.

A. From the start?

Q. Please.

A. I got a call at the Big Star Super Market out at the Fairlane Shopping Center.

Q. Approximately what time was it, sir?

A. I guess ten minutes of 11:00.

Q. Go ahead.

A. And a man said he wanted to go by his girlfriend's to pick up some luggage and then go to the airport.

Q. What did the man look like?

A. Well, what do you mean? He was a male, heavy set.

Q. What age was he? What was his age, please?

A. I guess—well, I know what his age was. He was twenty-four.

Q. How do you know that?

A. I read it in the paper. I don't know.

Q. You don't know then?

[100] A. No.

Q. How was he dressed?

A. Well dressed.

Q. How did he speak to you? Was his speech coherent, Mr. Staggs?

A. I could understand everything he said.

Q. Did it make sense to you?

A. Well, yes.

Q. Was it the kind of thing that cab fares usually say to you?

A. Well, yes, weather, this and that.

Q. How did he get into your taxicab?

A. Well, he started to get in the front seat. He said, oh, I will go ahead and ride here. He got in the back seat.

Q. Had he begun to get in the front seat before he said that?

A. Well, he had the door open.

Q. Where did he tell you to go?

A. He gave me the street address and I told him I didn't know where it was. He told me he would give me directions.

Q. Did he give you directions?

A. He did.

Q. Where did you go?

A. We went down Nolensville Road to Old Hickory Blvd. and made a right. I don't know the name of the street there. [101] It is the first street this side of Edmondson Pike, off Old Hickory Blvd.

He told me to make a left and as soon as we made my left, whe weren't but fifteen feet and he said, make a right.

Q. What sort of neighborhood is it?

A. It isn't a neighborhood. It is streets that have been paved out there, most of them. No homes were ever built close by.

Q. Did you have any conversation with this young man on the way out there?

A. Yes.

Q. What about?

A. The weather more than anything else.

Q. Did he make sense?

A. Yes.

Q. Did he ever say anything about there not being any houses there?

A. Yes. He said his girlfriend, he didn't know what made her move way out there, no homes being around there.

Q. When did he say that?

A. To the best of my knowledge when I made the turn off Old Hickory Blvd.

Q. Did he make it at the time when you could see with your eyes there weren't any homes there?

A. Right.

[102] Q. What happened then, please?

A. As soon as I made a right I saw it was a dead end and I thought, oh, and by that time I heard a click and looked around and a big revolver staring me in the face.

Q. Who was holding the revolver?

A. The passenger.

Q. What did he say to you?

A. He said, it's just not your day and I said, no, I guess it's not.

Q. What else did he say then?

A. He said, I am not going to hurt you as long as you do what I say. He said, I don't want your money. I just want to use your cab a little while.

Q. Now, was he still in the back seat?

A. Yes.

Q. Were you still in the front seat?

A. Yes.

Q. What happened then?

Did he give you any explanation?

A. He told me to pull up to the dead end up there and told me exactly what was about to take place.

Q. What did he tell you?

A. He told me, I am coming around your sid, we are going across the road, you are going to sit down with your feet in the ditch and I am going to tie you up or tape you up. I don't [103] remember his words.

Q. Did you follow his instructions?

A. I did.

Q. Did you drive the car down to the dead end?

A. Right.

Q. What did he do?

A. He did just what he said he was going to do, came down and marched me across the road.

Q. Now, going slowly and remember as best you can before he marched you across the road, did anything happen?

A. Well, I pulled a foolish trick. I reached for my cigarettes and trip sheet out of force of habit, I guess.

Q. Where were you when you reached for those things?

A. I was opening the door and getting out.

Q. Indicate for the jury, pretend you are sitting in your cab there on the witness stand and tell the jury where the man was standing in relationship to you.

You can use your hands if you would like.

A. I would say about straight out from the door there.

Q. Who opened the door, you or him?

A. I really can't remember that. I am pretty sure I

opened my own door. I am pretty sure I reached and opened it.

Q. After the door was opened, what did you do?

A. Well, I started to reach for the cigarettes and trip sheet.

[104] Q. Where were they, Mr. Staggs?

A. Well, the trip sheet I am positive was on the seat of the car and the cigarettes might have been up on the dash.

Q. To your right there?

A. To my right there, yes.

Q. So the man is on your left and you turned around and reached down for something at your right hip?

A. Yes.

Q. What did the man do when you did that?

A. He sort of waved the pistol in. He said, Huh-uh.

Q. How close was the pistol to you?

A. It was right beside me.

Q. Were you scared?

A. Certainly.

Q. Did you go across the road with the man?

A. I did.

Q. Did he have the gun all the time?

A. Yes.

Q. What happened when you got over there?

A. He handed me a roll of tape and told me to tape my ankles.

Q. Did you do that?

A. I was attempting to and I broke the tape twice. He said, never mind. He taped my hands behind my back and came around and finished the job up on my legs.

[105] Q. Now, when the man was finishing the job up on your legs, did he say anything to you?

A. Yes. He said when he came around, he said, no kicking. He said for me to stay there I think thirty minutes.

Q. Did he say what might happen to you?

A. No. He said if I didn't—don't worry, I wouldn't be left there. There would be somebody there within an hour or two to release me if I hadn't gotten untied myself.

Q. Did he say how somebody would get there within an hour or so?

A. He said he would notify somebody.

Q. Then what happened?

A. I sat there a good ten minutes, I guess.

Q. How long did he stay there before he left?

A. Well, when he went back to get in the cab he said—that was another time I was more scared—he sat there about two or three minutes before he pulled off.

Q. How did he pull off?

A. How?

Q. Yes, sir.

A. What do you mean, fast, slow, or what?

Q. Fast, slow or normal.

A. Just normally.

Q. Then what did you do?

A. I got my feet loose and walked across the field there [106] until I came to a house.

Q. Did the words the man spoke to you on that day make sense to you, sir?

A. Yes. He talked with plenty of intelligence to me now.

Q. Did he seem calm?

A. Yes.

MR. WINDSOR: May the witness be shown the map, please.

Q. Mr. Staggs, do you have a problem with your eyesight, close work?

A. Yes, I do.

Q. Will you please look at this map and tell us if—you don't have any glasses, do you, sir?

A. No.

Q. Look at the map and tell us if you can find the area where you drove this man to that day.

A. This print is a little fine. I can tell you exactly where the street is on here.

Q. If someone shows you Old Hickory Blvd. and Nolensville Road——

A. I can show them from there.

MR. WINDSOR: Without a defense objection, Your Honor, may I do that?

THE COURT: Sure.

Q. Here is Old Hickory Blvd., Mr. Staggs, and here is [107] Nolensville Road. Do you see the red?

A. Yes. This is Edmondson Pike, coming in here.

Q. Edmondson Pike is right here, sir?

A. It would be the last street on the left before you get to Edmondson Pike off Old Hickory Blvd. It really isn't listed on here.

Q. Thank you. Mr. Staggs, did you ever take an FBI agent back out there where you were taped up and show him the place?

A. I did.

Q. Did you find anything there?

A. Found the tape and stuff.

Q. Will you please look at the items I am handing to the Marshal, package of used tape and tin rolls. Were you present when they were recovered?

A. Yes, I was.

Q. Where were they found?

A. Part of them were found right at the scene and another part was found down to the home I went to where the lady took and untaped my wrists.

Q. She helped you get loose?

A. Right.

MR. WINDSOR: I would like to offer them into evidence as a Government Exhibit.

THE COURT: Let them be made part of the record.

[108] THE CLERK: Marked Plaintiff's Exhibit No. 5.

MR. WINDSOR: May the witness be shown the gun at this time.

Q. Look at this gun the Marshal is showing you and tell us whether or not it represents the one you were telling us about?

A. Yes. It was about the same caliber and it was a revolver.

Q. All right. On October 23rd could you tell whether or not the gun was loaded that was pointed at you?

A. Yes.

Q. How could you tell?

A. You could see the bullets out the end of it.

Q. In the cylinder?

A. Yes.

Q. Did you see them with your own eyes?

A. I saw the bullets sticking out the end of it.

MR. WINDSOR: Counsel may inquire.

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[192] DIRECT EXAMINATION OF
L. D. HUTT

BY MR. DURHAM:

Q. Dr. Hutt, will you state your educational background, please.

A. I received the Ph.D. in psychology from the University of Arkansas in 1968 and then did roughly a year's work at the Topeka Medical State Hospital under the Menninger Foundation in Topeka, Kansas.

Q. Tell us your work at Menninger in Topeka, Kansas.

A. I was involved in evaluating and treating individuals with various types of mental disorders including psychosis, neurosis, personality disorders, and so forth.

Q. What is your present appointments?

A. I am presently Director of Psychology Training at Tennessee Psychiatric Hospital an Institute in Memphis. I am also an assistant clinical professor in the Department of Psychiatry, Tennessee University Medical School, Diagnostic Coordinator, Shelby County Penal Farm and associate professor of psychology at Memphis State University.

Q. Do you have any connection with Tennessee University Medical School?

[193] A. Yes.

THE COURT: He just stated it.

MR. DURHAM: I am sorry.

THE COURT: Okay. Go ahead.

Q. At Dr. Munden's request, a physician, did you examine David Wayne Burks?

A. Yes, sir, I did.

Q. Have you prepared a psychological report on Mr. Burks?

A. Yes, I did.

Q. What did you find in your evaluation of David?

MR. WINDSOR: Objection. May we have the time and place?

Q. When did you examine him and where?

THE COURT: Just ask him when he conducted the study.

Q. When did you do this and where?

A. This was done in my private office at Memphis, Tennessee. I saw him for a total of six and a half hours on November 15th, on November 22nd, 1975.

Q. What tests did you perform on David?

A. The evaluation techniques used included a Clinical Interview in which we looked at his mental status, Human Figure drawings, Bender-Gestalt Test, Wechsler Adult Intelligence Scale, Rorschach Psychodiagnostic Technique, Thematic Apperception Test and the Minnesota Multiphasic Personality Inventory.

[194] Q. Who is Dr. Kenneth Munden?

A. I am sorry.

Q. Who is Dr. Kenneth Munden?

A. He is a psychiatrist in Memphis with whom I have worked fairly often in the past.

Q. Is he a trained psychiatrist?

A. Yes, he is.

Q. Referring to your report, if you wish, give your interview and observations and impressions of David.

A. When David came to the office I noted that he was a shorter than average, stockily built twenty-four year old white male. He arrived punctually for the sessions. I also noted that he had a receding hair-line and conservative style of dress and grooming that made him look somewhat older than his stated age.

I noted that David made quite an effort to present himself as a self-assured, poised and self-confident person but there were indications, namely closely bitten nails and visibly moist palms that lead me to suspect a good deal of underlying anxiety.

Further contact lead me to verify that impression.

I also noted that David's emotional state during the interview was rather what one might say high spirits, euphoric, which I thought was particularly unusual considering the circumstances of his referral, circumstances of why I saw him.

[195] Q. This was after the bank robbery you saw David, is that right?

A. That's correct.

THE COURT: And he seemed to be in high spirits outwardly, is that it?

THE WITNESS: Outwardly, yes.

Q. Continue, Doctor.

A. I noted he smiled, laughed and joked at describing the robbery; his subsequent apprehension by the police and the possible years of imprisonment he faces.

He voiced no regret about his actions and stated he does not fear imprisonment. In fact, he seemed to look forward to it, based on my interview with him.

It was my distinct impression that he views his actions as verifying that he is a "tough guy" and finds that perception of himself a reassurance against fears that he is essentially passive and vulnerable.

Q. Go ahead and continue with your report, please.

A. We talked a little bit about David and his history. He made every effort in these discussions to present himself as a hypernormal, super-rational, purposeful and controlled individual.

I asked him about his nerves and he disclaimed any difficulties past or present.

Quite to the contrary, he continued to characterize [196] himself as in control of my nerves and anxieties at all times, which I thought is rather unusual.

Most of us do have occasions on which our nerves and anxieties do get out of control.

By his report, he indicated that emotion played no part in my life. He went on to describe periods in which he feels that he has a heightened ability to concentrates, attend and think clearly.

He feels at those times, as if all senses are finely attuned and total mental alertness, and his reflexes are ready for any circumstances.

I noted in all this there was definitely a grandiose quality and as well as to statements about his football abilities and his stature in the peer group during his high school years and so on.

He attempted to view himself as a rather cunning, calculating, computer-like fellow who observes and manipulates the actions and reactions of others from a vantage point of bemused detachment.

Q. Will you state that again in different words, rephrase that?

A. The last sentence?

THE COURT: Like in a little more layman's language, is what he is telling us.

A. David presented himself I think when I was interviewing [197] him as a person who in his day to day life, he has what we might call a superman mind, superman mentality. He is extraordinary in this regard, that his is not like the rest of us, so to speak, that he is sort of a master mind.

Q. Well, is he in fact bright?

A. Oh, yes, he is definitely bright. In the intellectual evaluation I found him to be overall and above average.

Q. He elicited actions of others from a vantage point of bemused detachment. What do you mean by that?

A. I mean that David sees himself as cut off from others, as not being part of other people, for example, groups. He mentioned that back during his high school years although he was very popular, and so forth, with his peer group he never really felt he was part of the peer group, that he, himself, distanced himself from the group.

Q. You took a history of David, did you not?

A. Fairly extensive history.

Q. Would you relate what that was in relation to his condition going back to high school days, for example, his football and bringing up through his military service.

A. I don't recall all those details sufficiently to do that.

Q. Go ahead and continue with your report.

A. I asked him specifically about symptoms of mental illness such as hallucinations, thought control, the idea that [198] he could read people's minds or other people could read his mind. He denied all those things as stated but he went on to brag that he could hallucinate if he so desired, which I thought was another indication of the feeling of himself as totally in control of everything about himself.

He indicated he is not depressed. He indicated that feelings of estrangement, perceptual distortions were not without normal limits.

He indicated that a depersonalization experience—that is where a person feels he is outside of himself looking at himself—after a brain concussion sustained in a high school football game. That was the only depersonalization experience that he mentioned.

Q. All right. Continue.

A. My impression of David during the interview is that ordinarily he is able to converse very logically and his thoughts appear to be coherent. There is no evidence of any

sort of frank and well crystallized delusions. In other words, David is the sort of fellow that if you only talked with him for say a half hour or forty-five minutes, you would get the impression that there is absolutely nothing wrong with him, that there is no psychopathology. His facade in that regard I think is very good.

It was only after I had talked with him for probably a half hour or forty-five minutes that I began to pickup some [199] of the underlying pathology. There are times even in the interview where David will lapse into kind of a peculiar way of saying things.

For example, he talked at one point about an older brother as having been quote married out of wedlock. What he intended to communicate was that his brother got a girl pregnant and then married her.

He described this as being married out of wedlock.

There are times which his logic breaks down and his reasoning ability breaks down and this is even more apparent on the tests that I did. To summarize——

Q. Let's not leave that point right there. Elaborate on that. When you say there are times that his logic breaks down, elaborate.

A. There are instances in which David simply can't think, use his mind in the way that most of us can understand the majority of the circumstances. I would say David is very excellent at this. But if he is under stress, anxiety, that type thing, he loses the capacity to reason in his mind.

Q. Continue with your report, Doctor.

A. Just to summarize, based on the interview, I described David as an extremely anxious, insecure, vulnerable and socially isolated young man who has erected a paranoid, superman view of himself as a cunning and calculating mastermind.

Q. Can you say that in more lay terms, paranoid superman [200] view.

A. By paranoid, we mean particularly this is a psychotic condition in which the person feels that he is better than others, he feels that he is somehow above and beyond other human beings.

This is often characterized by suspiciousness and that sort of thing.

Q. You said he has a paranoid superman view of himself as a cunning and calculating mastermind.

A. Yes. The feeling on David's part is that he is quote a superman, that he is above most of the rest of us in terms of intelligence.

Q. That is true, isn't it?

A. Well, in one sense that is true. It is true that he is a very bright young man.

Q. He is above one hundred, above the rest?

A. Yes. This is more of David's perception of himself than his actual IQ indicates. He is definitely a bright young man.

Q. All right. Continue.

A. My feeling was that he was not floridly psychotic but his thought disorder emerges periodically in autistic logic and primary process.

By floridly, it is apparent to the ordinary person but his thought disorder, that is the underlying mental illness [201] does come out periodically in the interview and even more so in the psychological tests.

Q. You say here he comes out in autistic logic and primary process. What does that mean?

A. Autistic logic is a logic, reasonable processes that is not shared by the rest of us, a very personal way of reasoning and thinking.

Q. Is that also with primary process?

A. Right.

Q. Continue.

A. On the psychological testing I did, intellectually David earned a Verbal IQ——

Q. Before you get to that, read the last sentence.

A. His psychopathology is denied and appears to be thoroughly ego-syntonic.

Q. What do you mean?

A. By that I mean David completely denies the possibilities that he is ill and the term ego-syntonic means he perfectly accepts his psychopathology as being normal.

Q. So, are you able to say whether or not he was trying to convince you whether he had a mental illness one way or the other?

A. David in my contact with him attempted to convince me he was not mentally ill.

Q. Continue.

[202] Let's take up the question of intellectual evaluation.

A. On the Wechsler Adult Intelligence Scale, which is

standardized and used to measure the intelligence, David earned a Verbal IQ of 127. 100 is normal or average, 127 is in the superior range.

His Performance IQ is 115. That would be in the bright-normal or bright-average. And his Full Scale or overall scale IQ was 122, which puts him in the superior range of overall intelligence.

I indicated that these scores were considered to be accurate and reliable estimates of his intelligence and placed him in the superior classification of general intelligence.

His verbal skills, that is Verbal IQ are considerably advanced, according to his intelligence. It points to the sort of person who is particularly what we call overideational, he spends a lot of time thinking, the wheels of his mind are working constantly, which is often associated with hgh anxiety or the kind of paranoid process that we talked about.

Looking at the individual subtests——

Q. Could you relate that also to organic involvement?

A. Pardon me?

Q. Is there any relation to organic involvement?

MR. WINDSOR: I would object at this time. I don't believe this witness has been qualified on organic matters——

THE COURT: Well, he can testify on that concerning his experience——

[203] MR. DURHAM: Excuse me.

THE COURT: I want you to qualify him, if you are going to ask him about organic disorders.

Q. These tests, Rorschach and all, do some of them bring out organic involvement?

A. Yes.

MR. WINDSOR: Same objection, may it please the Court.

THE COURT: Wait a minute. Let him ask the questions. Go ahead.

Q. Is it within the realm of psychological knowledge as opposed to medical knowledge to note where there are fluctuations of IQ between Verbal IQ and other forms of IQ, would that be in the realm of the compentancy of psychologist, organic brain damage?

A. Yes.

Q. Does that apply to David in any manner?

A. I don't feel that this twelve point difference is definitive by any stretch of the imagination but it does raise a question of some organic involvement, particularly considering he does have a history of brain concussion.

Q. All right. Continue, please.

A. The various subtests on the WAIS I administered reflected relative weaknesses in judgment, that is common sense and his ability to comprehend and his understanding of social interpersonal relations and situations. [204] The interesting thing about his judgmental impairment, it isn't across-the-board type thing.

Under most circumstances David's judgment is good. His common sense is good but under certain circumstances and under certain conditions there will be lapses in his judgment.

I noted on the report that while he generally can size up situations accurately and respond appropriately he occasionally reacts on inappropriate, impulsive and panicked manner which is potentially dangerous to himself and other people.

His relative strengths generally were noted in remote memory, concentration ability, his immediate recall or immediate memory, his general word uses, his ability to abstract and his attention to detail.

I noted in the report——

Q. Let's take those one at a time, please. Relative strengths are seen in remote memory. Give us an example of that.

A. This would be the ability to recall things of his distant past. It would also be the ability to remember things that most of us learn fairly early in life, things like how many weeks are in a year, basic kinds of information like that.

Q. You said concentration. Go ahead and continue but explain them a little more in lay terms.

A. Concentration would be the ability to focus on working [205] out a problem. For example, an arithmetic problem. If you are given a fairly complex arithmetic problem it requires you to concentrate and keep the numbers in mind and work it through.

Immediate recall, this is the immediate kind of memory, that is if I tell you something now and ask you two minutes from now what I said, you would be able to recall it.

Word fluency means his general level of vocabulary, his ability to use words.

The ability to think abstractly is generally what we mean by reasoning ability or thinking ability.

Attention to visualized detail would be the act to focus in on the details of any given kind of situation and pay attention to those details.

Q. What do the relative strengths in these categories suggest to you, if anything?

A. They are suggestive of a person who is pretty much on guard, vigilant, overly alert to things going on around him, particularly overly alert to indications of threat, danger, that type of thing, which is, of course, consistent with a paranoid personality.

Q. Continue.

A. I indicated in the report that his thought processes as reflected by the intelligence tests are typically logical and reality oriented. When thinking breaks down, however, the break down is complete, resulting in a type of logic and [206] type of thinking that is definitely not normal, autistic and arbitrary logic.

Q. Autistic is what?

A. This is a personal, peculiar way of thinking.

Q. Can you give an example of that?

A. One example was on the test I had administered. The question is, in what way are a fly and a tree alike. Most people will say they are alike because the are living things. David's answer was that they are both related to a kite.

When I asked him to explain, he said you fly a kite and one obstacle is a tree. This is an off the wall autistic thought process.

Q. What is your personality evaluation?

A. I indicated in the personality evaluation that the Rorschach test, which is the ink blot test, corroborates the interview and the evidence of a schizophrenic thought disorder, several responses reflecting grossly arbitrary and autistic logic.

Q. Could you tell us this in more laymen terms? Rorschach is what test?

A. The Rorschach is the so called ink blot test. This is a test in which a person is shown a standard set of ink blots and asked to describe what he sees in the test or in the card. Based on that test we were able to evaluate the person's thinking and whether his thinking agrees with most of the

rest of our thinking and how he sees things around himself compared [207] to other people.

Q. Go ahead. Continue with the intelligence test.

A. Both the Rorschach and WAIS gave evidence of schizophrenic thought disorder, that is a disorder of thinking, disorder of reasoning ability reflecting arbitrary logic and autistic logic.

One thing I noted on the Rorschach is that he is prone to making sweeping generalizations based on insignificant bits of information and his thought processes in making these generalizations become very convoluted and very circumstantial, extremely arbitrary.

Q. Say that in lay terms about convoluted.

A. He kind of takes off on a path of his own, should we say, when thinking. Well, he simply doesn't think in the way that the rest of us do.

Q. Continue.

A. I have indicated that this style, style of thinking where you take very small, trivial bits of information and blow it completely out of proportion is classically that associated with paranoid thinking and sort of the thinking where a person can take a real but trivial bit of information and make a paranoid delusional system out of it.

A good example of this would be if someone notices a blue car parked out in front of the house, they might assume that this means that there is a conspiracy of some [208] people after them. The fact that the blue car is there is real but the interpretation of what they put on it is not warranted.

Q. What is ego defenses? What does that mean? What are they and what does that term mean?

A. It means the types of things that we do in controlling anxiety, keeping anxiety, nervousness, depression down.

The way David handles these sorts of things is he completely denies it, that he has anything wrong with him.

There is nothing wrong with me, nothing wrong with the way I think, with the way I feel, the way I act, this is perfectly normal behavior.

Another way that he has of dealing with his anxiety is to say there is nothing wrong with me but rather there is something wrong with you or the system or with other people.

He also avoids getting close to people, that is he tends

to remain very distant, very isolated from other people in order to keep down anxiety and nervousness and this type thing.

Q. Is he able to have close and personal relationships?

A. Not in any real sense. Dave can associate with people, he can go through the motions, I should say, of associating with people but it is not likely he is able to form any deep, emotional attachment with people, closely emotional attachment.

Q. Go ahead.

[209] A. I found that these defenses are ways of handling his anxiety is pretty brittle. By brittle, once they break down they really break down, they kind of crumble.

When the defense crumbles, he tends to become psychotic. Psychotic episodes of varying durations.

It is not David under most conditions but under certain conditions, prolonged stress or anxiety, that sort of thing, he can develop psychotic thinking.

I found that his anxiety level, his characteristic level of anxiety is very high such as he has to spend a lot of time maintaining his anxiety and doesn't have a lot of energy left over for more productive kinds of pursuits.

He is psychologically a strained person, his defenses are strained.

Q. Just continue, Doctor.

A. It seems because he is so strained, he doesn't have the kind of psychological and emotional reserves that most of us have to draw on when we find ourselves under stress or pressure. So that when he finds himself under pressure or anxiety or stress, he tends to break down.

I have indicated that the projective test data——

Q. Excuse me. Let me go back.

When does he break down?

A. Under prolonged stress, anxiety, fatigue, pressure, tension. Under any of those conditions.

[210] Q. What do you mean by break down?

A. By break down, I mean he lapses into a psychotic level of functioning over which he doesn't have conscious control.

Q. Go ahead, sir.

A. The personality testing data indicates that David tends to see things around him as rather dangerous and he sees himself as rather weak and unable to handle things.

In talking in terms of weaknesses, he doesn't perceive himself weak at the conscious level but at a deeper level, unconscious level he fears that he is a pretty weak kind of fellow.

Q. Explain that to the jury, how a man at a conscious level can see himself as very strong and at an unconscious level would see himself as a weak person.

A. Well, I think we have to talk about first the difference between conscious attitudes or feelings. It is entirely possible or very often characteristic of people that the way we see ourselves consciously, we would perceive ourselves consciously is not necessarily our underlying unadmitted perception of ourselves.

In other words, a conscious day to day level David does all kinds of things to demonstrate to himself that he is in fact a strong, adequate kind of person.

For example, his military career and that type of [211] thing, his football playing. But an unconscious level, a level which he is not aware which these personality tests tap into, the indication is that he does not see himself that way.

Q. All right. Go ahead.

A. I have indicated that he feels like he has to kind of always be on the alert and always be vigilant to ward off psychological threat. His conscious defense is to bolster his confidence by convincing himself that he is without fear or trepedation and possessed of unique and special abilities.

It is kind of like whistling in the dark to kind of reassure yourself psychologically that everything is okay.

It was my impression based on everything I looked at that his criminal activities and his attraction for rough and tough kinds of pursuits such as football and combat appear to be a way of demonstrating to himself that he is a tough guy rather than admitting to himself he feels somewhat vulnerable and puny underneath this.

Q. What about taking a gun and robbing a bank, how does that fit in?

A. I would see that as a manifestation of exactly what we talked about. That is, taking a gun and robbing a bank I think proves to David that he is in fact a tough guy, that he is a bad guy.

Q. What is your diagnosis of David?

A. My diagnosis was paranoid schizophrenia.

[212] Q. All right. Now, Dr. Hutt, these things that you

testified to about David's personality, is that based just on conversations with David or do you as a psychologist have a long battery of tests that you give?

A. This is based partly on conversations with David but most of the evaluation and diagnostic work is based on psychological tests, rather extensive battery.

Q. Have you brought the raw tests that you gave to David?

A. Yes.

Q. You administered all these tests personally?

A. Yes.

Q. Have you brought them to the courtroom today?

A. Yes, I have.

Q. All right. Let's start with the (Spelling) WAIS test.

MR. DURHAM: I have copies for each member of the jury. They are lengthy and I also have one for the Court. May I pass it to His Honor?

THE COURT: Let me see it.

MR. DURHAM: I intend to go through each page line by line as long as Your Honor will permit me.

THE COURT: What do you want me to do about it?

MR. DURHAM: I have copies for each member of the jury. The witness has the original copy and Mr. Windsor [213] has his copy and I have my copy.

I want to discuss it page by page.

THE COURT: Do you have any objection, Mr. Windsor?

MR. WINDSOR: No, Your Honor, if they are returned after this.

THE COURT: Oh, yes, they will be returned.

Let them have them for reference.

MR. DURHAM: Your Honor, we are a little short. We may have to ask the alternate to look on.

THE COURT: All right.

The alternate can share it.

MR. WINDSOR: Before he begins, may I just examine one of the pages the jury has so I will be following along?

THE COURT: Sure.

MR. DURHAM: May I proceed, Your Honor?

THE COURT: Go ahead.

Q. Dr. Hutt, let's start with the WAIS Record Form, David Burks on the left-hand corner.

A. Yes.

Q. Go through that. As much as you can without my questioning you, just explain it.

THE COURT: First tell us whose handwriting this is, if it's yours or Mr. Burks or what.

THE WITNESS: Yes, sir. This is my own handwriting.

[214] THE COURT: All right.

A. What I have done is——

Q. You did these tests on those two dates you testified to earlier, is that correct?

A. That's correct, the 15th and 22nd.

On the face sheet there, the very first sheet this is just a description or labeling of the different subtests that are involved in this WAIS, (Spelling) WAIS. If you notice under subtests it has information comprehension, arithmetic, similarity, digit span, vocabulary, picture completion, abbreviated, picture arrangements, block design, object assembly and digit symbols.

These handwritten scores under the column labeled raw and weighted, these are simply scores that we use in computing the IQ or intelligence quotient. It really has no meaning to a non-psychologist.

Q. It might have some meaning to us. Can you make the subtests have meaning to us in relation to David's mental problem?

A. The information subtests as I said before, this is a test getting at remote memory.

Q. You didn't get that one, did you?

A. Information?

Q. Yes.

A. Yes, I did.

[215] Q. Maybe I am confused. I don't see any mark by that.

A. I am referring to these right down here.

Q. I see. Okay.

A. On the information subtests he got a raw score of twenty-three and weighted score scale of fourteen which mean that he did a pretty good job.

Q. That is the next page, isn't it?

A. The information subtests, actual items administered and his responses.

THE COURT: This top page is just a summary sheet?

THE WITNESS: Yes, sir.

THE COURT: Why don't we get away from that.

MR. WINDSOR: Something was omitted on that top summary sheet.

THE COURT: Well, you can get to it later.

MR. DURHAM: If you tell me what it is, we will get to it now.

MR. WINDSOR: Later will be fine.

Q. Go ahead with the information and correlate the two, the front sheet with the questions.

A. These questions listed on Pages 2 and 3 make up the information subtests referring back over to the face sheet which would be abbreviated down in the lower left-hand corner, information.

[216] As I have indicated on the information, we asked questions you might say beginning at least on common knowledge, facts most all of us would know or have picked up. For example, what are the colors of the American flag, what is the shape of a ball—

THE COURT: Wait a minute. Mine doesn't have anything except the typed word flag.

THE WITNESS: Yes, sir. This is just kind of a cue to us to help us remember exactly what phrase the questions is.

Q. Go ahead, Dr. Hutt.

A. So, we started out with very simple kinds of items like that, how many months are in a year, Number 4, what is a thermometer, that type thing.

THE COURT: I don't see anything on here except the words. I don't see the answers there. I see answers further down, apparently.

THE WITNESS: Yes, sir. The first four items on this test are not administered except when we suspect that a person is mentally retarded.

The standard procedure for administering this test——

THE COURT: You don't put any entry there if he says, red white and blue? Is that right?

THE WITNESS: Yes.

[217] THE COURT: Okay. Now, we are getting somewhere. Go ahead.

Q. Go to Number 5.

A. Where does rubber come from? David's response was, trees, which is a perfectly good answer.

Q. You have given him a score of one if he gets it right?

A. A score of one. Each correct answer on this subtest gets a score of one.

The sixth item is, name four men that have been president of the United States since 1900.

David did quite well on that. An interesting thing was that he tended to get a little bit pertinacious, a little bit inflated on this.

For example, Dwight Eisenhower, Lyndon Baines Johnson, Richard M. Nixon. Most people would just say Kennedy, Eisenhower, Johnson, Nixon, and so forth.

Q. What does that mean, if anything?

A. It kind of suggests a kind of pertinacious quality that goes along with David's inflated view of himself and his actions.

Item Number 7, Longfellow was a famous man. What was he? David answered correctly, a writer. Item Number 8, how many weeks are there in a year? David answered correctly, 52. Item 9, in what direction would you be traveling if you went from Chicago to Panama? David answered correctly, South, [218] which I have abbreviated with an "S".

Item 10, where is Brazil? David answered correctly, South America, which I have abbreviated with "S. A."

I would say between Items 7, 8, 9, 10 there is nothing particularly of note there.

Q. Skip over those things that don't have any significance.

A. Item Number 11, the question is, how tall is the average American woman? David becomes very indecisive and kind of hedges around back and forth on this item. Item Number 12——

Q. Does that mean anything?

A. Yes. I think it is part of his difficulty of thinking and making a decision.

Q. Go ahead.

A. Item Number 12, what is the capital of Italy? He smiles and he says the capital of Italy is Rome and then he said, no, that doesn't seem right but I will go with it. Its probably some off the wall place like Palermo or Bologna which is kind of David's far fetched way of thinking, his inability to accept the obvious. He looks beyond the obvious and apparently again is very suspicious, paranoid way of thinking. Item Number 13——

Q. Let me ask you, how many people with 127 IQ would know the capital of Italy?

THE COURT: He wouldn't know.

[219] MR. WINDSOR: Objection.

THE COURT: I just stated the objection before it was made. How would he know, how many people with 127 IQ would know what the capital of Italy was? Let's go.

Q. Go down to 13.

A. I don't think anything particularly was significant there.

Number 14, I think this is perhaps the best insight on this particular subtest and to David's way of thinking.

The question is, when is Washington's birthday? 99% of the people, I say 99% of the people I have administered this to assume we are talking about George Washington and they always assume I mean the month and day. David says, are you talking about George Washington, which again I think reflects his tendency not to accept the obvious, to be kind of suspicious, to really pin you down.

Then he says, I would say 1726. He say, do you want to know why I made that guess? He says because in 1776 he was the president of the United States. The Constitution and Declaration of Independence and since youths were younger then when they achieved things it was probably about fifty years old, he was about fifty years old.

I stated at this point I realized he was getting way off base. I said, what about the month and day? He said, do you want me to guess? I said, yes, take a guess. He said, [220] August, but I couldn't say as to the day. He says, do you want me to give you the reason why I guessed August? I said, yes.

He said, well, he believed before the advent of the birth control, most conceptions of babies occurred in the winter and most births occurred in August.

Really an arbitrary kind of logic. From one standpoint—

THE COURT: I thought one is when he answered correctly? Everything he said was wrong from the year to date and month. Why did you give him a one?

THE WITNESS: This was a scoring error. This was a clerical error.

THE COURT: You should have zero then?

THE WITNESS: Right.

THE COURT: That is what I thought. Go ahead.

A. Again I think that response there pretty much indicates how David on occasion can get totally out in left field and kind of get caught up in his own arbitrary logic.

Item 17, nothing particular.

Q. We skipped 15.

A. Item 15, nothing significant there. He answered to Shakespeare. 16 he answered in an acceptable manner, nothing particular there.

Item 17, the question is, how far is it from New York to Paris? He gives an acceptable response there, nothing [221] particularly signific[illegible]

Item 18 the question i[illegible]ere is Egypt? He first of all says, I don't know what you are looking for. He said, do you mean geographically where is it? Again, I think that reflects a suspicious bit on David's part.

Most people would automatically assume if you ask where is Egypt, you would be talking about geographically.

He misses that and says it is on the European Continent. I don't believe there is anything else of particular significance on the information subtest.

Q. All right. Let's go to the next test, comprehension, is that right?

A. Right. The comprehension subtest is essentially a test of common sense, reasoning, judgment, ability to know what you should do in certain situations.

Again Items 1 and 2, these are automatically given credit if we don't suspect the person is mentally retarded.

They are not even administered.

Item Number 3, the question is, if you found an envelope on the street that is sealed, addressed and has a used stamp on it, what should you do? David's response is, what should you do? As to imply that there may be a difference between what you should do and what he would do. I replied, yes. He said, you should mail it. Then I inquired, what would you do? He said, well, I might be tempted to look inside it. [222] However, most things on the street are not really significant anyway So, he says he would go on and mail it. This I think kind of reflects the impulsive antisocial kind of orientation on David's part.

Itme Number 4 is why should we stay away from bad company? His response there is, what do you mean by bad company? Again this reflects the kind of suspicious flavor

of David's thinking and his inability to respond to things in terms of the obvious.

Then when I tell him by company I mean the conventional definition of bad company. He says the simple reason is that they could cause trouble for you, that you might not want.

I say, cause trouble and he says, they could do something you wouldn't do and since you are there you are part of it. Which is not a full credit answer. The best credit answer would be that you would be likely to be influenced by that company in the way you are acting.

Now, I mentioned in the report that certain circumstances David reacts impulsively and in a kind of panicked and ill thought out manner.

Q. In what, ill thought out?

A. Panicked and ill thought out manner. I think the next item gets better at that. The question here is, if you were in a crowded movie theatre and smelled smoke or say fire, what would you do? Of course, most people would say I would
[223] go to the usher or manager and notify him and he could evacuate the movie house in an orderly fashion.

David says rather immediately, I would yell fire. In my report I alluded to the fact that his judgment could sometimes be impaired to the point it would be harmful to himself and other people.

This is an example of what I was talking about, where he simply comes up with a very impulsive way of handling a situation, where it is not thought out.

Q. Do you know why David just might have given you that answer? If he is found incompetent it would be to his advantage.

A. I don't think so. In general he did a very good job on this test. So, my feeling would be if he were trying to fool me, if he were trying to present himself as incompetent he would have picked up errors on down in this test, and he did not do that.

Q. You stated earlier you felt he would like for you to find him incompetent and was trying to fool you, if I understood your testimony corectly.

A. No. I said I felt David was trying to convince me he is competent, not incompetent.

Q. I see. Go ahead.

A. The other items he does very well on. Item Number 9

I think perhaps is worthy of comment. The question there, [224] Item Number 9 is, if you are lost in the forest in the daytime, how do you go about finding your way out? Well, the obvious way, of course, is to check the moss or follow a stream or look at the sun. David very much—he gets a correct answer here but he very much over complicates that. He first of all says, well, it depends on how thick the forest is. If you can't see the sun and you have a watch—if you can see the sun and you have a watch, you can determine the direction and walk in the direction that you know is the closest exit to the forest. In other words, he gets the right idea but he uses a much more complicated way of expressing it than he would need to.

Again, reflecting the kind of over complicated thought style he has.

Q. All right. What is the next one?

You talked about death or whatever the next one is that is significant to you.

A. Item 10 I don't think is significant. Item 11 I don't think is significant. Item 12 is not particularly significant. Item 13 is not particularly significant.

Item 14, the question is, what is the meaning of this statement, one swallow doesn't make a summer? David misunderstands summer to be supper and I corrected him and said, no, summer. He said, is there a bird named a swallow? I said, yes, there is. Then he says, when you see birds come out it doesn't necessarily mean that summer is here. That is [225] stupid. Then he says, I never heard that before. For all I know birds could come out in the fall of the year.

Again he kind of takes off with a very personal, arbitrary interpretation of a very simple question and as a result gets no credit on that item.

The main thing I would say that the comprehensive subtest indicates that in general David's judgment is pretty good but under certain conditions his judgment is very much impaired. He is likely to be impulsive and react in kind of a panicky way.

Q. Before we leave this, let me go to the question of David trying to fool you.

Are there controls built into this test so you can tell whether or not he is trying to fool you?

A. Well, there isn't a lie scale or malingering scale. However, as part of our training and part of our clinical

experience in practice, we become pretty good at picking up that kind of thing.

For example, a malingerer, someone trying to fool you, will give you responses that are very nearly accurate but they are off just a little bit. For example, if you ask a malingerer how many weeks are in a year he might say 53 or if you ask him how many months are in a year he might say eleven, almost but not quite.

This is a very consistent pattern with malingerers.

[226] In my opinion David was not malingering, attempting to fool me on these tests.

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[229] Q. If he got more right answers, for example, with respect to similarities say, what effect would that have? Is that the intelligence part or pathological disturbance part?

A. Similarities?

Q. Yes.

A. Well, it is both. Similarities, the ability to handle similarities, reflection, intelligence. But psychopathology, thought disorder did also creep into the similarity subtest. There can be evidence of thought disorder in the similarity test which is exactly what we have here in this case.

For example, Item 12 the question is, in what way are praise and punishment alike? Most people there would say these are ways of disciplining or influencing other people.

David said, these are both means of gaining recognition of some sort, some act or action, which may have some implication in terms of the act he perpetrated, namely the robbery.

Perhaps this was some way of gaining recognition for himself.

Item 13, this is the item I alluded to in my report. The question is, in what way are a fly and tree alike? The typical answer is that they are both living things or both are part of nature, or something like this.

David says that they are both related to a kite. He says, you fly a kite and one obstacle is a tree, which is really out in left field.

[230] This makes no sense in terms of handling that item. This is what I mean when I said that ordinarily David's thinking is very good but on occasions he really breaks down.

Q. Let's skip Number 5 and go forward.

A. Digit span. The task here is to give the patient some numbers. You call them out to him and the patient's task is to listen carefully and repeat these numbers back to you. Of course, you give him two or three examples so he is able to follow you, and so forth and so on.

David did quite well on that. He got eight digits forward and after you determine how many digits forward the person can remember then you go back and say now, I am going to give you some numbers and I want you to give them to me in reverse order.

I will say it forward and you say it backwards. He did exceptionally well on that.

He was able to reverse eight digits, which is something in my experience very few people are able to do. Generally six or seven is about the highest.

Q. What is significant of that, if anything?

A. I think the significance is that it reflects the sort of hypervigilant, hyperalert, hyperattentive type of relationship that David has with things going on around him. He also saw that as a challenge of proving himself and very much rallying to the occasion, which again is David's [231] personality makeup.

Q What is the story you called—

A. That is a test that is given when we suspect impairment of memory and there is no reason to suspect any kind of memory impairment in David. So, I didn't administer that test.

Q. What is Number 6, picture application?

A. Picture application is a subtest in which we present the patient with twenty-one different little pictures and they are roughly two and a half inches by two and a half inches, the cards are. In each one of these pictures there will be some significant detail missing, some significant detail left out.

For example, the first item, there is a picture of a door and one thing that is missing there is the door knob. The patient's task is to pick up the detail that is missing in each of these pictures.

David does extremely well on that. He only misses two items out of the entire twenty-one, which is in my experience very typical of a person who is paranoid, who is very attentive to minute kinds of thing in the environment.

* * * *

[235] Q. Okay. Going back to the cover sheet, do you want to sum up the WAIS for us now?

A. The WAIS is a test of intelligence. On the WAIS David came out with an overall IQ, full scale IQ of 122 which is in the superior range. He seems to be generally better in dealing with words and ideas in working with his hands or putting his ideas, and so forth, in practice. In general I found his thinking, his judgment, his common sense, that sort of thing unimpaired. In other words, no across-the-board general kind of impairment but under certain circumstances the impairment and judgment do come through.

The impairment in thinking does come through. Basically that is it as far as the WAIS goes.

Q. Doctor, we have four more tests. You look at these and tell me chronologically, or tell me which one we should take up next.

A. You might take a look at the Human Figure Drawings next.

Q. Hold it up so the jury can see it to make sure we all have the same one. Okay.

A. In this test, which is a test of personality and personality functions, we instruct the patient to draw first of [236] all a human figure. We tell him to make a full body figure, not just stickmen and that sort of thing.

The patient at this point can either draw a male or female, black, white, any type of figure he chooses to draw.

Then after he draws his first figure then we ask him to draw a figure of the opposite sex. In other words, if he drew a male the first time the second time he draws a female. If he draws a female first, he draws a male second.

And then over on Page 3 we ask the patient to draw a picture of a person in a rainstorm.

Now, again he can draw a male, female, child, adult, anything of that sort. Now, we might start here with his first drawing, that is the drawing of the male figure.

Some things that are interesting here is the heavy choice of shading and kind of sketchy, uneven quality of the drawing.

Q. What page are you talking about?

A. I am talking about Page 1. This kind of sketchiness is typically associated with high levels of anxiety. The treatment of the eyes on this figure is particularly char-

acteristic of the eye treatment of a paranoid person, that is the way David drew the eyes, particular characteristic of a paranoid individual.

Notice that he draws the person kind of as a bum, very disheveled dress and that sort of thing where David himself [237] appeared before the session very well dressed, very well groomed.

Generally the interpretation of the human figure drawings is that people draw when they are asked to draw a human figure, they put a lot of themselves, perhaps an unconscious view of themselves into the human figure.

So, if we assume that is true then David apparently sees himself not quite as the strong, capable sort of fellow that he presents himself consciously to be. On the second page—

Q. Excuse me. Before we leave that, what about these comments you made? Is this your handwriting again?

A. This is my handwriting. I asked him to tell me something about the person he drew. He said he is sixty years old, he should appear contented with hair and beard. I conveyed that although he is conventional he didn't care what people think. He could easily dress in a suit and tie. I say contented because I don't want him to have worries—this I think is very interesting. I say contented because I don't want him to have worries about security or where his next meal is coming from.

He says that picture is me. I feel about like this fellow. I think there he is saying I can't allow myself to feel any insecurity or any worries because I can't incorporate that into the views of myself.

[238] Q. Explain that, the left bottom corner.

A. He commented to me that the last time he took the Human Figures Drawing he drew a Vietnamese girl and he said, quote, the psychiatrist or psychologist, one made snide remarks about it. I don't know what those snide remarks were supposed to be but again I think it pointed to the paranoid suspicious, guarded view.

Then we will move to the second page, the drawing of the female. This figure—

Q. Let me interrupt you. Why would it be suspicious and paranoid if you drew a picture of a Vietnamese girl and the doctor made a remark?

A. The drawing of the Vietnamese girl would not be and the doctor making a remark would not be but using the word

snide would be. David, he thought it was attacking or criticizing his efforts.

From the drawing of the human female, this drawing comes across as a very anxious sort of person. The facial expression seems to be very glum, sour. The human figure is situated sort of hinged over like this on a stool. Note that the arms are up like this in a very protected kind of position. The interesting thing is that this figure drawing has the characteristics of an older woman.

I would say a very old woman. David says, no, sir, she is about twenty-six and he goes on to say she is also a [239] secure individual, no outside worries and no worries about growing old, no worries about money, and so forth. Then he says she is not on a bar stool, she is on the kitchen stool. Her back is to the kitchen looking at the TV or fireplaces, or fireplace.

He himself says that the arms aren't folded to protect or security. If the drawing was better—if my drawing was better she would be sitting like this, and he demonstrates leaning back on the bar stool very comfortably.

Again I think David's side comments here, he points out time and time again that this is a very secure person who does not need protection, which the ordinary person would not feel compeled to do.

That much emphasis on protection and security I think reflects that this is definitely a problem with him. The overall quality of the figure drawing there reflects a lot of anxiety, a lot of personality difficulty.

The fact that the figure is drawn of a profile is also suggestive of a person who is rather guarded, evasive, doesn't really want to reveal himself completely and again would be consistent with a suspicious, paranoid person.

Q. How do the comments given get on the paper?

Does David tell you about the picture or do you ask him specific questions?

A. I routinely ask the person to tell me something about [240] the individual that you have drawn. Ordinarily the person will say, well, specific age, maybe occupation, that sort of thing. It is somewhat rare for a person to go into the kind of detail that David did, particularly about this business of security and not needing protection and that type of thing.

Q Is there any significance in the fact that he drew the stool and hips first and breast area last?

A. Generally people will start out with the head area when they start drawing. Nothing particularly is significant except to say that it is pretty unusual for a person to start out in the manner that David did.

Q. Are we finished with that one?

A. Yes.

Q. Let's go to the next one.

A. In the third figure drawing we ask the person to draw a picture of a person in a rainstorm and the reason we do this is that the rainstorm symbolizes psychologically outside stress and outside pressure, anxiety, tension, that sort of thing.

By comparing the overall quality of the figure on this drawing in the rainstorm vs. the overall quality of the figures in the other two drawings, we get an indication of how the person is likely to react psychologically to stress or tension or anxiety or pressure.

I would like for you to note that the figure on the [241] third drawing is very, very small. Note how tiny and insignificant the figure is in relationship to the size of the figures on the first two drawings, indicating that when he gets under stress he tends to regress psychologically and to somewhat be compensated psychologically.

The first two figure drawings were not that great but much better than the third one.

Q. Is there a comment that the rainstorm is not included?

A. Right. He indicated he did not include the rainstorm in his drawing, which is what we talked about, denial, his choice of denial of any problems. For a person not to include the rainstorm there could very well reflect that he needs to just deny that anything is going on outside, that there is any kind of stress or pressure or anxiety.

Q. Are we finished with that one?

A. Yes.

Q. Is there anything else on that?

A. No, I think not.

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[244] A. This is the Rorschach Psychodiagnostic Technique, ink blot test.

What this test is is a series of ten standard ink blots that

are prepared on cardboard cards and they are presented to the person in a standard kind of way and he is asked to describe [245] what he sees in the ink blots as he looks at it.

Q. Are they on the back sheet?

A. These are not exactly reproductions but they are similar to form. The original of these, some of them have color. The color is not reproduced.

Q. Except for the color these are the ones used?

A. Except for the color and size. The original ones are considerably larger than these. These are reduced in size.

THE COURT: Let me see. You asked what does the first look like and he says something?

THE WITNESS: Yes.

THE COURT: All right. Let's move.

A. He says on Number 1, I would have to say a bat. He says that simply because of these two protrusions, referring to the location chart these meaning these two little things up in the center that kind of look like hands.

MR. WINDSOR: Objection. How can he say what they mean.

THE COURT: If he pointed it out, he can.

MR. WINDSOR: He didn't testify to that.

THE COURT: Okay. Is that what he told you?

THE WITNESS: Yes.

THE COURT: Go ahead.

A. Simply because of these two protrusions, and I said, anything else? He says after about forty-five seconds studying, [246] I would have to say, no. I asked him what area of the card looked like the bat and he says the whole thing, and asked him what makes it look like a bat. He says, wings, structure and antennas and feelers, protrusion of the feet. He says, incidentally the bat is laid back in flight. That is a very common, ordinary, popular kind of response, nothing at all significant there in terms of content.

The fact that he focused in on the two little protrusions and said looks like a bat because of those two little protrusions, is very similar to paranoid tendencies, to take very small bits of truth and blow it completely out of proportion.

The second card he says looks like a pelvic bone. It even

has a pretty good picture of a Coccyx or tail bone and says it doesn't matter. He turns it around a little bit and says it doesn't matter what direction it is in.

I would say nothing particularly significant about that response, fairly good in terms of form level, somewhat unusual to focus in on that part of the human anatomy.

Nothing really mentally disturbed about that response.

Q. What about the 11 and 9?

A. That is eleven seconds, nine seconds. This is the time between when I presented the card to him and the time he responded.

Card three, this is where David's thinking really [247] takes off and this is where his impairment and judgment and impairment in thinking, his kind of autistic thought process really comes through.

On card three after he has six seconds he says, I would have to say these are two ladies. It looks like they are doing something together, maybe establishing some type of conversation.

Now, so far so good. That is an excellent response to that card, typical response to the card. It is only on the inquiry when he really takes off and demonstrates his disturbed thinking.

I asked him why does it look like two women and he says, well, the heads, the rears, the legs, they have shoes down here, it looks like they are doing something with their hands and looks like they are engaged eyeball to eyeball in conversation.

So far so good.

Now, David begins to really—his thinking begins to fall apart. They are both pregnant and that is what they are talking about. These are their hearts and they are joined. That is the area in between the two things that look like kind of human figures. These are the hearts and they are joined.

It is not like they are one but it implies contact. It symbolizes the closeness of the two and then the two little funny looking things up on the top, he says these look like fetuses up here, they are close to the head. Since they are [248] close to the head that means they are in their thoughts.

He says they are ugly as fetuses are and I would say in pretty good shape.

I questioned him and he said fetuses are ugly. The women

look like birds. They are bird people and fetuses look like birds.

I said you mean a human being with bird like features, or exactly what do you mean? He said a human being with a bird like feature or a bird with human features but it has high heels on.

Now, this type of response is highly indicative of mental illness, that is the labeling of something as both human and animal, part dog—as an example, part dog, part human, that type thing.

That is a very pathological response. I went on to question about the hearts and he says, well, its the shape. They look like hearts because its the shape and plus it is in the chest area. I asked about the fetus and he said it looked like a fetus because of the fetus and the position. I asked about the conversation and he said the conversation is pleasant and there is uncertainty because neither of them have been pregnant before and they are talking about it.

Now, this is an extremely elaborate, detailed, overworked kind of response and I think reflects the type of thinking that David sometimes does and the type of thinking [249] he is capable of.

In other words, his thinking, logical thinking breaks down and he takes off arbitrarily—the second response on that card says, could be a lane with two trees marking the entrance.

Q. Still on card Number 3?

A. Still on card Number 3.

He said a country lane or road in the country. Nothing I would say pathological about that response except in the inquiry he talks about trees guarding the entrance to the lane. Again the idea of guarding, protection, necessity to be protected and also be on guard, which is pretty much consistent with a paranoid way of thinking.

That was all on card 3.

Card 4 he says, I have to say a swamp with overhanging trees, Cypress trees. That is all he says on there. It says you are at the edge of a swamp looking in. Configuration is not important, only the dark coloration and overhanging trees.

The emphasis on the darkness of this is highly suggestive of anxiety, and we have seen other indications of anxiety in the testing data.

This I would say is not a highly pathological response but it points to a high level of anxiety.

That is all he did on card 4.

Card 5, he says, this is a butterfly, and this is very typical, ordinary kind of response. Then he says, can't [250] help but say it looks like a sheep skin. Again that is a pretty good response. But when he talks about the sheep skin he says it looks like that because it has dark coloration and fringes and edges like a fur, again indicating pretty high level of anxiety.

And still on card 5 his third response, it is also on all of them, I see a short line, inlets and peninsulas, but that is characteristic of ink blots.

In the inquiry he says this bigger one is from a distance of about two thousand feet and the little one is from a distance of twenty thousand feet, so it is actually bigger.

To arbitrarily say these are viewed from a particular distance, this is a very unusual kind of response on the Rorschach.

The perception of the island, inlets, peninsula, things seen from the distance is often suggestive of people feeling cut off from other people and distant from other people.

Card Number 6 he says this looks like a wolf head or skin that has been laid out—laid down with the head intact. The perception of an animal skin there is nothing unusual but to say it is a wolf skin is somewhat unusual and sort of reflects his perception of other people as being predatory, again reflecting a need for guardedness.

His second response on the card, he says shorelines, inlets, clouds, insect anatomy such as pinchers.

Again the shorelines, inlets, clouds reflect pretty [251] high anxiety and feelings of being cut off emotionally.

Card Number 7 says this is a well drilling device, head of a well drilling device. He says the way it is shaped, it is encompassed by dirt and soil and he says it doesn't actually look like dirt and soil but it is encompassing the bit and that for that reason it must be like soil.

He says it is an oil well or whatever. Again the anxiety is indicated in that response.

Q. Why is that?

A. The use of the color on that. He talks about the dirt and soil encompassing the bit, and the use of the shading and dark color will tend to reflect anxiety.

Q. Let me ask you why is that? You answer was to that —your answer speaks of color, the darker the color the greater the anxiety.

A. This has been pretty well demonstrated by research on the Rorschach, that people who tend to focus in on shading, shading of black and white tend to be rather anxious kinds of people.

There are all kinds of theories as to why that is true but I don't think that would be necessary to go into.

Q. All right.

A. The second response to that card turned upside down he says I don't know how to say this. It is a comic strip called Bode, a little purple fellow. There are two of them [252] and here is the long nose and eyes, and I can't remember what magazine. It may be Psychology Today. I am not familiar with that comic strip but the quality of the response was somewhat suspect.

Q. Card—

A. Card 8 he says, I see two whales.

Q. Is there anything significant about the fact that apparently David reads a psychological magazine?

A. Psychology Today is a popular newsstand kind of psychological magazine that may or may not be significant. I don't think it necessarily is significant.

THE COURT: All right. You are on 8?

A. Card 8 I see two whales but they both have legs and tails. I guess it would have to be more appropriate to say Salamanders.

A good response, nothing particularly disturbed about that response.

The second response to Card 8, he says this is peculiar. I can see the central nervous system, it's intact. I see the two hemispheres of the brain, the thoracic region and lower lumbar region and all has been dissected from the rear and placed on the page in a two dimensional picture.

It is accurate except the spinal cord is unprotected.

Now, anatomy responses on the Rorschach, which this is, are not highly unusual but this particular response [253] emphasizing the exposed nervous system I think pretty much reflects the kind of condition that David finds himself in. That is that he is underneath this facade a very sensitive, very touchy kind of individual.

He has a lot of, metaphorically speaking, a lot of nerves exposed and is a touchy sort of person.

Card 9 he says he sees a big bird sitting on top of something. Instead of wings he has two balls which could be fists pointing out towards you. I am really stretching my imagination. I have to grope to come up with anything.

This is not a particularly good form level response. It is also an extremely paranoid response. This is the eagle as seen like this and is coming at him. He said, I can see his head and eyes if you are looking directly at him. It looks like he has his arms and fists doubled up.

Card 10 he says, I see two trouts. That is a very typical kind of response.

I see the shoot of a tree about three inches in diameter, about three feet off the ground that has been cut off. Nothing particularly significant about that.

He also says that he sees two red blood cells and I believe he said he saw platelets inside of them. Nothing particularly pathological that comes through on Card 10.

In general I would say the Rorschach is pretty consistent with the other test findings.

[254] In most instances David did very well on the Rorschach but in certain selected instances his thinking very much broke down and got off on a tangent, which suggests in real life although he can function generally from time to time he lapses as a phycotic type.

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[258] Q. The last thing we have is what I take to be the history, is that correct?

A. Clinical Interview.

Q. Yes, sir, Clinical Interview.

Is there anything about that that you want to comment on?

MR. WINDSOR: May it be held up so the jury and I will know what one he is talking about?

THE COURT: Is that the one that starts out, situation, robbed the bank?

THE WITNESS: That's correct.

THE COURT: All right.

A. These are just very rough notes that I made based on the interview, notes about what David said, what he indicated to me about the act and that sort of thing. I don't

think there is anything in particular that would lead—I think it was pretty well covered this morning when we reviewed the psychological report itself.

Q. Doctor, based upon your evaluation of David, do you have an opinion as to whether or not he was suffering from mental illness at the time of the commission of this crime in [259] October, 1975?

A. Yes, I do.

Q. What is that?

A. I feel that he was suffering a mental illness at that time.

Q. Do you think David knew right from wrong?

A. In a rational-intellectual sense he knew right from wrong.

Q. Assuming that he knew right from wrong, was the mental illness such to render him substantially incapable of conforming his conduct to the requirements of the law that he is charged with violating, namely, the bank robbery?

A. Yes. I believe he was not able to control that.

Q. Will you explain that answer, please.

A. I believe at that time when he was planning the robbery and that sort of thing that his behavior was not under his control, that he was not fully capable of controlling that behavior which was kind of an irresistible urge.

Q. You do think he knows right from wrong?

A. In a general sense, yes.

Q. I believe you testified that you have a diagnosis of paranoid schizophrenia for his illness?

A. That's corect.

MR. DURHAM: You may cross examine.

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[260] CROSS EXAMINATION OF L. D. HUTT

BY MR. WINDSOR:

[264] • • • • •

Q. Yes, sir. Let me paraphrase this and if there is any objection or you want to add something, please signify so.

The upper half of the first page he described the bank robbery prior to last year and he tells you why he committed it.

A. That's right.

Q. What reasons did he give you?

A. He said that he robbed the bank in order to get out of an unsatisfactory military situation. He was having an affair with a married girl and felt that that would solve that problem and also in his words put the parental situation on the line. That is where his parents really carried for him or really didn't.

Q. He volunteered that information to you?

A. On inquiry, yes.

Q. Now, doesn't that indicate to you, sir, he reasoned this thing out?

A. There is no question that he reasoned it out. He is capable of reasoning things through but I think most of us, the opinion would be that that was not a very satisfactory solution or realistic or logical solution to the situation he found himself in.

Q. No, sir, it's not satisfactory but it shows he was capable of reasoning, doesn't it?

[265] A. Yes, that's correct.

Q. And he actually did bring about what he setup to bring about, didn't he?

A. That's correct.

Q. Do you see many people who are faced with problems that they can't solve?

A. Yes.

Q. Do you see many of them who operate or choose ways that just solve the problem for them so they don't have to contend with it any more?

A. A fairly—

THE COURT: Let me ask you a question. You said he had the three reasons to commit the robbery. The only way he could have achieved success in those was to get caught and go to the penitentiary, is that right?

THE WITNESS: That was his thinking, yes, sir.

THE COURT: Yes. If he robbed it and had not been caught he would have lost all his objectives, wouldn't he?

THE WITNESS: That's correct.

THE COURT: It wouldn't help with his parental situation, wouldn't have gotten him out of trouble with the married woman and wouldn't have anything to do with the military situation if he just escaped after robbing the bank?

THE WITNESS: That's correct.

[266] THE COURT: He had to get caught after robbing the bank?

THE WITNESS: That's correct.

THE COURT: Go ahead.

Q. He got what he wanted out of it?

A. That's correct.

THE COURT: He got caught.

Q. Let's go to the other. He supplied these words to you as you testified?

A. More or less. They are paraphrased.

Q. Are the words paraphrased or are they his words?

A That was his word. He said he didn't do it for logical reasons, it was an impulsive act, I blew everything. There he talks about blowing a good job, good future relationship with his parents and that sort of thing.

Q. He really didn't like the job, did he?

A. He was not entirely clear about that. At one time he talked as though he did like the job and another time he did talk as though he didn't like the job.

Q. Did you learn from your interview with David that his parents had been a source of great distress for him?

A. I learned from David that there had been a history of conflict.

Q. If my word stress doesn't fit in there, if it doesn't, tell me a better one, please.

[267] A. I suppose stress would be an accurate word.

Q. You saw this man under stress and anxious when he came to your office?

A. He was acting in an anxious kind of way.

Q. He bites his fingernails, right?

A. Right.

Q. Let me ask you a hypothetical question. You may not know the facts. Assume you do for the purpose of the question.

Assuming that David Burks had been living with his mother for about a month in this stressful situation and she had been after him fifteen times to brush his teeth, fifteen times to make his bed and fifteen times not to go out of the house without his shoes and to dress up and clean yourself up, do you reckon that would have generated any stress on a man?

A. I am certain it would have increased the stress, no question about it.

Q. Do you think it would have made him chew his fingernails, sir?

A. Perhaps.

Q. You have underlined the word lead up and you put a question mark. And the words—I don't want to offend anybody but I will go ahead and read it so you don't have to—good frame of mind until Tuesday morning. Pissed off then when went to trunk of car for samples. Impulsive decision to return to Memphis, and turning to the next page, why not like, [268] question mark underlined, inexperienced trainees and everybody was treated alike—officers inexperienced—felt like could have been officer then, felt better qualified.

He is describing his job, isn't he?

A. Yes.

Q. That is why he was pissed off, wasn't it?

A. That is some of the reasons he was feeling particularly disgruntled at the time.

Q. And he associated this feeling of being pissed off when he went to the trunk of his car to get samples, didn't he?

A. This wasn't entirely clear. I don't know what it was about going to the trunk of the car and getting samples that caused him to flare-up. Apparently that did precipitate it.

Q. Let me ask you this. In your experience, if you think that precipitated it and he told you he didn't like the job, don't the two go hand in hand, sir?

A. I don't understand the question.

Q. You have said probably the fact he went to the trunk of the car to get the samples precipitated the flare-up.

A. Yes.

Q. Wouldn't he have associated the samples with the job?

A. That is a reasonable assumption.

Q. Fine. If he didn't like the job and the samples caused his mind to associate it with it, they go hand in hand, don't they?

[269] A. In time, certainly.

Q. It was then that he said, going back to our front page, decided the hell with it, cleaned out the apartment next day, drove around knowing I would do it.

A. Yes.

Q. So, he knew this for how long, according to what he told you?

A. A day or so.

THE COURT: Knowing to do something. "ST" is something, isn't it?

THE WITNESS: Right.

THE COURT: I heard him read that before, not it.

MR. WINDSOR: That is quite right.

A. He described his mental state at the time after getting disgruntled there with the samples as feeling that he would have to do something. But he indicated to me he didn't know what at the time, it was over this period of a day or so that the idea of robbing the bank came to him.

Q. All right. The samples and job precipitated the flare-up and caused him to think he had to do something and he, you said, was rational, something he has to do is get rid of that job, isn't it?

A. That is one of the effects, right.

Q. Did he tell you his father had for a long period of [270] time encouraged him very strongly to have a job and to behave in the way that his father behaved?

A. He indicated that his father had put some quote pressure on him to that effect.

Q. From the feeling you got about David, do you think he could have gone to his father and said, Father, I don't like this job, I am going to quit?

A. No, I don't.

Q. So if he had to get rid of the job he had to find another way to do it, wouldn't he?

A. That's right.

Q. He doesn't have that job now, does he?

A. No, he does not.

Q. Now, sir, on the second page you said he was grandiose in describing his football abilities. Did he indicate to you he was pleased with his football ability? Was it something he was proud of?

A. Yes. He indicated that he felt he had had quite a bit of football potential but due to the fact he was smaller than most let's say college football players that this was quite an achievement for him, that he worked extremely hard, was quite dedicated and he was extremely good, exceptionally good.

Q. Did he ever indicate to you it was important to him to please his father?

[271] A. At one time or another either directly or indirectly he did.

Q. Let me ask you a hypothetical question. Assume a football game is being played on the night David was the quarterback. He threw a touchdown pass that won the game and five or six times after the football game he asked his father who won the game. Do you think he could have been trying to say, Father, are you pleased with me, I won the game?

A. Very definitely.

Q. Do you think that could have been the response he was requesting from his father?

A. That is highly likely.

Q. If his father said, you did, David; you did, David every time does it make it even more likely?

A. Right.

Q. Doctor, do you believe David Burks has ever had a psychotic episode?

A. Yes, I do.

Q. How certain are you?

A. I am, shall we say, quite confident based upon my findings.

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[286] Q. Doesn't the interpretation that a psychologist gives to these things depend on his prior experience in his own life?

A. To a certain extent.

Q. And everyone's life isn't like everyone else's life?

[287] A. That's correct.

Q. On that basis alone, isn't it possible for one psychologist to weigh these results differently than another psychologist?

A. No question about it.

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[290] Q. Evidently you didn't think his little doll was very important because you didn't mention it anywhere in your record.

A. I didn't know about the doll.

Q. Isn't it very difficult to make a retrospective statement about a person's state of mind in a time that is passed?

A. It is difficult, there is no question about that. The fact what I am basing my decision on is that he shows the potential and capacity to become psychotic under certain conditions and considering the kind of off the wall nature of the act as I understand it, it would certainly be consistent [291] with a psychotic episode.

Q. What sort of psychotic episode?

A. I don't follow you.

Q. What words would you use to describe it to someone?

A. I would use words such as an urge which he was not able to control.

Q. How long did it last?

A. Based on what he told me it apparently lasted two to three days.

Q. When did he rob the bank?

A. What date?

Q. Which of the days did he rob the bank?

A. Some of the details I forget. I think it was on a Thursday, second or third day.

Q. Does that mean he restrained the urge for three days?

A. No. I think it means he knew he was going to do something but didn't know quite what. There was an urge to behave but he didn't quite know what he wanted to do.

Q. All right. So then if he had done anything else and it hadn't been wrong your testimony would be the same, about whatever he decided to do?

A. Right.

Q. Would it make any difference that he may have had a reason for choosing whatever this something was, the reason for his choosing this mean anything to you?

[292] A. Yes, I think it would. If he had, for example, robbed the bank for financial gain and that sort of thing, I would make less of it in terms of mental illness than the reasons he gave me; mainly he didn't know what to do but he had to do something.

Q. All right, sir. Taking this hypostasis he had three problems facing him in 1971 and he solved them all by robbing a bank and in 1975 he had a problem and didn't know how to solve it and he told you I knew I was going to do something and I drove around and knew I was going to do something and finally I did do something and it turned out to be a bank robbery; do you see any relation between the problem he couldn't solve and the fact he robbed the bank to solve three problems before?

A. No doubt about it.

Q. You think it is still an impulse he couldn't resist?
A. Yes, I do.
Q. You don't think he could have reasoned it for resolving his problem?
A. Not in the first sense that he described the first robbery.
Q. Did he have good recall?
A. Pardon me?
Q. Did he have good recall, sir?
A. Yes, he did.
Q. If you were talking to a doctor, medical doctor and [293] said David Burks had a psychotic episode on October 23rd and robbed a bank, what medical word would you use to tell the doctor what psychotic episode it was?
A. I would say a psychotic episode and that would be about it.
Q. Would you describe it? Would you characterize it?
A. Beyond being psychotic, no, I couldn't. I would say that it was an episode in which he was apparently not hallucinating, he was not acting in a totally berserk way, his actions were pretty much organized, shall we say.
The psychosis of it manifested itself from a standpoint that this was something he had to do and couldn't resist doing.
Q. Let me ask you another hypothetical question.
Assume that David came into your office and you said I am going to give you this MMPI test and he said, oh, don't bother, my score is so and so and that means I am a paranoid schizophrenic and you went ahead and give him the test and that wasn't his score. What would that mean to you?
A. It would mean very little to me because I don't have much faith in the MMPI. I use it only in conjunction with the other tests.
The MMPI is the type of test that can be easily faked.
Q. You gave it to him, didn't you?
A. Right.
[294] Q. Now, if you were going to describe the psychotic episode at the bank to a medical man, would you call it paranoid?
A. I would say it was a psychotic episode in a paranoid schizophrenic individual.
Q. Would you say he was paranoid and schizophrenic during the episode?

A. Yes.
Q. Would the fact he had total recall favor that or be against it?
A. It would be to a certain extent irrelevant. One of the characteristics of certain types of paranoia is the height in recall, that type thing, awareness.
Q. How common is paranoid?
A. How common is paranoia?
Q. Yes.
A. I don't have the statistics available.
Q. What is your experience?
A. In the population that I see namely at the Tennessee Psychiatric Hospital and in my private practice and in the Shelby County Penal Farm that is a fairly frequent diagnosis.
Q. Are you familiar with the Diagnostic Manual of Mental Disorders of the American Psychiatric Association?
A. Yes, I am.
Q. This was made by psychiatrists, wasn't it?
[295] A. That's correct.
Q. It is widely accepted?
A. It is widely accepted. It is also widely criticized.
Q. But it is the official publication of the American Psychiatric Association?
A. That's correct.
Q. Let me read to you under heading 297.0 titled Paranoia. This extremely rare condition is characterized by gradual development of an intricate, complex and elaborate paranoid system based on and often proceeding logically from misinterpretation of an actual event. Frequently the patient considers himself endowed with unique and superior ability, which is consistent with what you said.
And now the last sentence. In spite of the chronic course the condition does not seem to interfere with the rest of the patient's thinking and personality.
A. My diagnosis is paranoid schizophrenic not paranoia.
Q. All right. You wouldn't agree—

THE COURT: No, he didn't say that, Mr. Windsor. You asked him about paranoia. He said his diagnosis was paranoid schizophrenia, which means a little more.
MR. WINDSOR: I see the difference now, Your Honor.

Q. Was he hostile and aggressive when you interviewed him?

[296] A. No.

Q. Was that consistent with paranoid schizophrenic?

A. It is not typical of a paranoid schizophrenic but not inconsistent with a paranoid schizophrenic.

Q. Is the fact that he had no hallucinations also not typical of paranoid schizophrenic?

A. The paranoid schizophrenic, the various schizophrenia is pretty much intact, much more intact than some of the other subclassifications on schizophrenia. Paranoid schizophrenias do at times hallucinate. Hallucinations, by no means do they invariably occur with paranoid schizophrenias.

By the same token hallucinations don't indicate the presence of schizophrenic.

Q. Do you believe he told you the truth about everything during the interview?

A. Substantially, yes.

Q. Hypothetically if he hadn't would it make a difference in your diagnosis?

A. If he had not told me the truth, I don't think it would.

Q. So it didn't make any difference on your diagnosis then, did it?

A. What he told me was less important than the way it was presented. Again the test findings, these were weighted [297] very heavily in my final evaluation.

Q. Now, if he had told someone other than yourself that he had been planning a big job and it wasn't the bank robbery for a long time and it wasn't associated with him getting pissed off on Tuesday, would that make any difference in your diagnosis.

A. I think essentially, no. Again I think the testing data and plus the interview data would tend to substantiate my diagnosis independently of how long he planned it and that sort of thing.

Q. Do you believe he knew right from wrong on the day he robbed the bank?

A. At a purely intellectual, rational level, yes, I think he probably knew what he was doing was wrong by conventional standards.

Q. What about other things? Do you think he knew he should stop at the red lights on that day?

A. I am sure he did.

Q. So he was able to conform himself to some laws but not to other laws?

A. That's correct.

Q. Now, you said he didn't have any close emotional relationships and this fact also supported your conclusion that he was paranoid schizophrenic.

A. This is consistent again wtih paranoid schizophrenic. The fact that a person doesn't have close, emotional relation[298]ships doesn't indicate that he is paranoid schizophrenic necessarily. Again it is the weight of the evidence.

Q. Well, when you went through your tests, sir, a lot of them that he got the right answers on you didn't talk about them.

A. Well, I was attempting to speed on along. I established the fact that under most conditions I thought David does reason quite logically, quite well and I didn't see a point in spending a whole lot of time on that.

Q. Do you believe if there was a policeman in full uniform standing beside him he would have robbed the bank?

A. No. I think he was—would have feared being shot. I think that would have kept him from robbing the bank.

Q. So he would have been able to resist the impulse?

A. That's right.

Q. If there had been a policeman parked outside the bank would your answer be the same?

A. I would say that the probability of him going ahead and perpetrating the act would have been greater.

Q. The fact that you answered no he probably wouldn't have means you think his mind would have kept him from it?

A. I think probably what he would have done is gone to another bank or have postponed it until a later time and waited until the policeman was not there.

Q. By an exercise of his will?

[299] A. Well, I don't know whether you call it will but an exercise of discretion.

Q. Discretion?

A. Yes.

Q. So he was capable of discretion, wasn't he?

A. He was capable of discriminating when he would be shot, when he was likely to be shot and when he was not.

Q. Was he also capable of discretion in planning the details of the robbery?

A. He was capable of planning it, no question about that.

Q. That wasn't my question. The word was discretion and I had taken it from your example.

Was he capable of discretion?

A. I would say so.

Q. Now, is it true that many psychologists and psychiatrists feel that the ink blot, Rorschach test is very unreliable?

A. There are those that feel that way.

Q. And it is also true that there are those that think the picture drawing test is very unreliable?

A. That's correct.

Q. Why do you think the MMPI test is not a good test?

A. Based on my experience with it. I have had an opportunity over the past several years to compare MMPI findings with findings on the more expanded and comprehensive batteries and I have not been impressed. In the individual case my feeling [300] is that you never actually know what you are dealing with on the MMPI.

Q. Is it true only one person in the world can tell us what was in David Burks' mind on October 23rd?

A. I would have to grant that.

MR. WINDSOR: May I have just a moment, Your Honor?

THE COURT: All right.

Q. How soon after he robbed the bank did his impulse subside?

A. I am sorry.

Q. How soon after he robbed the bank did his impulse subside?

THE COURT: Impulse to what?

MR. WINDSOR: Irrestible impulse.

THE COURT: For what?

MR. WINDSOR: To do something.

THE COURT: He already did it. Did his impulse to rob the bank subside?

THE WITNESS: Yes.

THE COURT: All right. Go ahead.

MR. WINDSOR: I have no more questions.

THE COURT: Anything further?

MR. DURHAM: No, Your Honor.

[301] THE COURT: Let me ask you a question. As I understand it the defendant in his interview with you indicated that he thought his first robbery was a logical thing, is that right?

THE WITNESS: Yes.

THE COURT: Because he robbed to get out of an unsatisfactory military service.

He robbed the bank to get out of involvement with some married woman and he committed the robbery to put the parental situation on the line, is that right?

THE WITNESS: That's right.

THE COURT: The only way that could be logical is to be caught, is that correct?

THE WITNESS: That's correct.

THE COURT: So to that extent it was logical only to go to the penitentiary? That is what he wanted to do?

THE WITNESS: That's correct.

THE COURT: And the second one you have here that he didn't do it for logical reasons. As I understand your answers to Mr. Windsor on cross examination you indicated that you agreed with him, that he hated his job?

THE WITNESS: No, sir. I didn't mean to agree that he hated his job. My statement was that—

THE COURT: But his dislike for the job triggered something? Isn't that what you said?

[302] THE WITNESS: No. I am not sure of that. He indicated to me in the interview that overall he liked his job but that there were certain things that really got under his skin such as this business of feeling like his superiors were no more knowledgeable than he was.

So he felt very mixed about the job, I suppose.

THE COURT: But he was mixed up about the job, he got upset, he decided the hell with it, was his language to you, is that right?

THE WITNESS: Yes.

THE COURT: And a solution then was to do something and that ended up in robbing the bank? The only way to get rid of that thing would be to get caught again, the same thing?

THE WITNESS: Yes.

THE COURT: He wanted to go to the penitentiary?

THE WITNESS: That's right.

THE COURT: All right.
Call your next witness.

* * * *

[304] DIRECT EXAMINATION OF
LANDRUM TUCKER

BY MR. DURHAM:

Q. Dr. Tucker, will you give us your educational background and professional qualifications?

A. Yes. I got my AB from the University of Tennessee in 1961; M. D. from Stanford University, 1966.

Q. Is that in Palo Alto, California?

A. That's right. I interned there for a year, did my resident training from 1970 to 1974 in North Carolina, University of North Carolina.

I am now an Assistant Professor of Psychiatry at the University of North Carolina and I am also a member of the U.N.C. Duke Psychology Institute; American Psychiatric Association, American Medical Association, certified in psychiatry by the American Board of Psychiatry and Neurology.

Q. All right, sir. At my request did you examine the defendant, David Wayne Burks?

A. I couldn't hear you.

Q. At my request did you examine the defendant, David Wayne Burks?

A. That's right, I did.

* * * *

[306] A. Do you want me to kind of go through it and make a summary of the interview?

Q. Yes.

A. All right. At the time I saw Mr. Bruks he came across to me as polite, talked politely, neatly dressed. My initial impression was that he was intelligent, well educated, very cooperative with me during the interview.

His mood initially seemed calm and collected. There [307] he was tense at times, would smoke a fair amount. It was noted whenever he made negative comments about himself or others rather than show anger he would tend to laugh or smile.

I got the impression as the interview went on that under

the surface of Mr. Burks there was a great deal of anger that he kept under the surface very much. He was oriented to time, place and person. On a couple of occasions he got up and checked around the room to be sure nobody was listening. He tended to isolate affect again, mood, very little change in his mood during the interview. He was defensive, seemed to defend against painful aspects that involved particularly angry feelings towards his family, disappointment with himself and what he felt guilt regarding relations to others in his past and probably most with his Vietnam experiences.

There was a content of thinking grandiosity and an indentification with the aggressor which I felt was defensive against the feeling of helplessness and insecurity.

His thought processes, he talked in a controlled, steady voice and obsessive quality to his thinking, some difficulty going from one area to another, seemed to be tangential in his thinking tending to go off from one question into many details leading him into many areas. There wasn't any obvious looseness of association, flight of ideas. At times it seemed the reasons he gave for his actions were irrational or illogical, [308] such as going to great length to lie to his parents so they wouldn't know he had a Jewish friend, because he thought they would be angry and not talk to him.

Q. Let's elaborate on these instances that you feel are significant.

A. I asked Mr. Burks as he was telling me about his past life, it came up that during high school he many times would lie to his parents. I asked him what the lying was about.

He smiled and said that there was certain things that didn't make sense to others, but within his family that the family had strong feelings about certain things he might do, like a person he would know they wouldn't approve of that he would make a story up. He would go and rather say he went over to a person's house and watch a football game, he would go and buy a ticket at a movie theatre and keep the stub and show it to his mother to show that he was at the movie rather than the friend.

I said, why is this so necessary? He said because my mother wouldn't talk to me for a week and I had to avoid that. He talked about also in a previous situation of robbing a bank some few years ago. One reason he felt this

was a rational decision was that a girl friend he was with at the time, he wouldn't have to reject her. If he was unsuccessful with the bank robbery she then would reject him and that to him [309] was a reasonable reason for robbing the bank.

Also that the money he received would be a way he could keep from having to depend on his parents for support, if he had the money that would free him from his parents.

It seemed to him to be another reasonable solution, depending on his parents.

To go on——

Q. Let me back up a minute. In your report you talk about guilt regarding his relationship with others in the past, with his Vietnam experience and depression and hopelessness. Would you comment on that?

A. Yes. There was one situation where he described, he told me there was a particular girl friend he had had in Junior High School, that he had been very close to and that he had felt his parents would reject her. Actually they were too young to take the relationship seriously so he felt he had to reject this girl, that she suffered very much from this rejection and he, himself, felt very guilty that he could never completely explain to her why he had to do this, and this again came up in the later situation, much later when he robbed the bank, he didn't want to have to reject a girl again.

The situation in Vietnam was when I got into asking Mr. Burks about his experiences there, he was very modest, tended to down play any role he had in the medals he received.

He initially said that he loved the experience there [310] but noted he had a different kind of relationship as many of the other young men his age. He tended to stay with what he called the lifers as opposed to many soldiers his age who were drug addicts and tended not to go along with many rules and were very hostile.

During that time he was again reluctant to go in to detail about the experiences he had gone through.

I asked him what he must have seen, killings, and so forth, and he said, of course I saw that.

Then he related a couple of instances where there were children around but he wouldn't go into detail with what happened to the children. He mentioned being involved in

missions where it involved napalm, which I assume would be using napalm on the enemy.

He talked about when he was a combat medic, of being in situations that were involved making decisions that had to do with deciding who to give medication to and who not to and again he kept himself very removed and isolated from these situations.

He went into some detail about bodies that he had to pick up that were friends and being torn and multilated and how he had no feelings about this and talked about once you got used to what you had to do there you found yourself pretty well isolated from your feelings, that was part of the job.

Again it would seem to be that he was pretty uncomfortable talking about these experiences and I had trouble [311] getting too much more in detail at that time.

Q. Did David make the decision on who would live and die in the medication situations?

A. That's right, sir, yes. He said he was in a situation where he was always having to favor the American soldiers over the Vietnamese soldiers because that was standard at the time. There would be only so much medication and he had to decide to leave certain people out.

Q. You report the thought processes and verbalizations. Tell us what that is, explain that.

A. Specifically? Let's see.

Q. On Page 2.

A. Talking in a controlled, steady voice. Obsessive quality and tendency to tangential thinking.

Q. What does that mean?

A. Again he would go, kind of go along what I felt Mr. Burks would kind of keep the feelings out, he talked in a very controlled, steady way. Tangential thinking, it would be hard to keep him on a question. He would go off one question into other thoughts. He would be so methodical in the answer to a question it would be hard for him to go to some place else.

In that way there was some difficulty in communicating with him.

Q. What do you mean in obsessive quality to his thoughts?

A. The idea that he would choose words that have little [312] affect, little emotion. He would be careful so as to choose words that would not make you feel one way or the

other. He was very good at this. He would speak very carefully. Mainly it has to do with avoiding feelings and being very methodical to an exaggerated degree to maintain calmness.

Q. What about his fantasy life and dreams?

A. He didn't remember any dreams and his fantasies again were hard to get into. I asked him about it and tried at other times to talk about fantasies. I was pretty unsuccessful in that.

Q. What about relationships with past girl friends in high school?

A. Well, he did comment, as I think I said, about it. He thought about her quite a bit. Even now he would think about her and over his actions of rejecting her. The only time he would put somebody out to be close to another person and be very disappointed—he admitted disappointment. Since then it has been very difficult to be close to anyone, especially a woman. He would rather wait for women to approach him rather than he approach them, because of rejection.

Q. You speak of his superego structure. What issues could you think of that are important?

A. I said the following issues are very important. He sets very high standards for himself and he looks down on those his age that succumb to using drugs and living a loose life.

[313] Q. Does David use drugs or——

MR. WINDSOR: Objection. How can he know?

THE COURT: As far as he knows is all he can do.

A. As far as I know, no.

Q. Go ahead. Continue.

A. His ego ideal of his adolescence, what his ideal was to become a successful football player. His brothers had been very successful of being smart, good sons, one a doctor and one a lawyer.

Mr. Burks has a superior IQ of 125 yet he found it difficult to study in school. He always settled for lesser grades saying that the reading and studiousness were products of his older brothers. His values and wishes for himself involved the hope of becoming independent of his parents and being able to care for himself without any specific occupation in mind.

He told me he wished now he would have stayed in the Military. Mature ego ideals are poorly integrated——

Q. Excuse me. The jury doesn't understand mature ego ideals and neither do I.

A. All right. We all have ego ideals, images we would like to live up to. Mature ego ideals are things that we can live up to, things that lie within reality.

Immature ego ideals have something to do with super people, super this, the best person, the best this, a very [314] exaggerated kind of ego ideals. This is what a two or three, four year old would have.

Q. Go ahead.

A. He has trouble staying with any one thing for very long because he feels strapped and shackled. He still has this feeling of staying with anything very long like trying to stay in school, he would get disappointed in himself and quit, stop.

Part of his superego structure seem very harsh and critical.

Q. Superego is conscious?

A. That's right. Ego ideals, superego are both parts of consciousness. He has very high standards for himself in a way. He is very critical and condemning of certain parts of himself.

Q. All right.

A. When he was growing up, as you know, you heard already he was a very religious young man. He had been away, forced upon him, but at the same time had no difficulty with the law whatsoever.

It seemed to all come after the Vietnam experience. He felt guilty about being home late and displeasing his parents. He also felt his parents were watching over him excessively. He could never perform well enough to suit them even when—even when he seemed like he was doing the best, he didn't feel he got praised.

[315] Q. You interviewed Mr. and Mrs. Burks and his brother Larry, the attorney?

A. That's right.

Q. Can you give us an example of what you learned about his history, the fact that he couldn't measure up to what his mother and dad wanted for him in his own mind.

A. Well, the impression as I talked to them on that, they tended not to give Mr. Burks any undue praise. When we

talked about his being an all state football player and very outstanding, there was kind of an air, question, well, David did do those things, he did a pretty good job.

The mother said in terms of David's exploits in the War and attempts to be successful and being an Airborne Trooper and all these kinds of very risky type of achievements, well, yes, David was pretty brave but he is really scared of lots of things, lot of fears.

Not being aware, I think at times they tended to not give David very much credit for some of the things he worked hard to get their praise for.

Q. Tell us about the little anecdotes Mrs. Burks said where the whole family was there, and David was in the living room cracking his knuckles and tell us what that means.

MR. WINDSOR: Is he going to testify of something his mother said?

THE COURT: In the presence of the son. We will [316] find out all about it, I guess.

Go ahead.

A. As I was getting ready to leave the parents were trying to think of other things about Mr. Burks that they wanted to bring up to me and one thing was about his fears, and while Mr. Burks was sitting there they began to talk about his being afraid of the water and about his being afraid of dolphins and fish. As a way when they were talking about David they began to almost laugh about it, which was a little inappropriate.

They didn't seem to be aware of David's feelings as he was sitting there listening to this, he might be feeling ridicule or kind of undercutting him.

Q. What was David doing during that time?

A. He was being quiet with a blank expression on his face.

Q. What did David's father say when David threw the winning pass at the football game?

What does that mean psychologically to you?

MR. WINDSOR: I don't understand the question, Your Honor.

Q. This was the time David was knocked out.

MR. WINDSOR: Is counsel testifying to this? This witness wasn't in the courtroom.

MR. DURHAM: I am asking a question of the witness.

[317] THE COURT: I understand it. Ask it again.

A. Did David or his father in the course of taking the medical history—did you come across an incident in which David threw the winning pass and won the football game and was knocked unconscious and his father came over to him and spoke certain words to him and David replied, or whatever?

A. Yes.

Q. Would you recount that incident?

A. I am trying to remember it. I can't remember exactly what was said. It was in the line of rather concern about David or any praise about the kind of really super effort he had put forth to that point. He made some other comment that didn't seem to cue in. It was kind of insensitive to David's feelings. I can't remember what was said.

Q. Going back to the report, let's pick up there where he speaks with a great deal of anger and rage in Mr. Burks, particularly after his failure in athletics at the University of Arkansas.

What happened there?

A. From what I remember Mr. Burks told me he worked extremely hard in football and wanted to go to the University of Arkansas, he was small compared to other football players in college. He built himself up and had a lot of injuries. When he played there he worked real hard to make the team but because of his size it was a struggle for him. Yet he did feel [318] somewhat unfairly treated and unappreciated by the coaching staff and he, himself, told me he decided to quit the team because of his disappointment at that time. He never drank and smoked and he started drinking and smoking the next day. Right after that he decided to join the Military with the purpose of going to Vietnam.

Q. All right. What was the purpose of his joining the Military and going to Vietnam? You might want to refer to your report, if it refreshes your memory.

A. I think what I said, which is what I thought, his wish at that time was to get into combat and was to be a chance to release some of this rage that had been penned up so long and to continue his growing tendency to put himself in a very dangerous life-threatening situation.

It seems like Mr. Burks beginning in high school began to, as he didn't let out his feelings, took it out indirectly harming himself. This seemed to be in line with going to Vietnam and getting in combat.

Q. Let's take that. What about high school, playing football?

A. It is my impression from talking to Mr. Burks and his father, we talked a lot about his experience, that Mr. Burks took repeated risks and he was advised over and over again by physicians after he had several head injuries, all being serious, not to go play football again.

[319] Each time he would go out and play football again.

THE COURT: With his father's permission, consent or urging?

THE WITNESS: As his father put it to me, Judge, with reluctant permission.

He felt like if he didn't let Mr. Burks play football Mr. Burks would completely be very depressed.

THE COURT: As a medical doctor, if a man has repeated concussions and even in one occasion has hallucinations as a result of it, should be continue to play a game that has or involves physical contact as football does?

THE WITNESS: It would be my recommendation that he wouldn't.

THE COURT: All right. Go ahead.

Q. Do you have a release in there, a letter from a physician that said you let David play once he got a release from his parents?

Do you recall reviewing that document?

A. I don't recall that particular one.

Q. So you said he puts himself in these threatening positions in high school. What about after high school?

A. After high school again the situation in college was pretty much the same. He put himself in the situation there where he received lots of bodily injury, of course, trying to make the team.

[320] Then, of course, in the Vietnam experience he wanted very much to put himself in a position where he would be in combat even to the extent, it is interesting, he became a combat medic where he would be in a position to getting himself killed and less likely to kill somebody else.

Q. What about the two bank robberies? Is that consistent?

A. From what I understand of the situation that seems to be consistent, he again would—he didn't hurt anybody. He, himself, almost got killed.

His father related to me the night before the first bank robbery he threw himself down some stairs whenever he was with some friends playing a game and drinking. People were running down the stairs to see how fast they could get from the top to the bottom.

Instead of running down he threw himself through the air and landed on his head. That seems like what he must have done many times in football.

Q. Looking at the bottom of Page 3, speaking of the bland, detached affect he has now towards his experiences, would you pick that up there.

A. What page is that?

Q. Page 3 at the bottom.

A. Bland?

Yes. I was saying that I think his bland, detached affect he has now towards his experiences reflects——

[321] Q. You are talking about his bank robbery experiences?

A. And past experiences with people and disappointments, his strong defense against underlying guilt and pain. I think it was my impression that during the Vietnam experience, as he participated in more actions that were alien to his conscience that he had developed, that it led to a weakening of the prohibiting part of his conscience and this had some definite role in his later actions.

Q. Say that in simple language, would you?

A. Well, in simple language Mr. Burks got into the War situation for mixed reasons. He wanted to prove himself. He had a lot of rage. In a way a lot of it was self-destructive.

He wouldn't be too disappointed if he got killed, and at the same time another part thought he couldn't get killed because he was a superman. He was put in a situation over there where it was all right for him to do things initially. He was involved in actions where it involved dead people, napalming, he saw other people being treated in a very inhuman way and he was put in that position as well.

Mr. Burks' conscience in particular was affected in such a way when he got back into this country it couldn't function for him as well. The prohibiting part, the part that

says you will not do this that keeps you from doing this, when you get angry it keeps you from hitting someone, something irrational, criminal, it rendered Mr. Burks inactive not all [322] the time but sometimes.

Q. On Page 4 you speak of his concept of himself. What is that about?

A. Again it sort of fits into the idea of the ego ideal. We have a self concept, and by the time Mr. Burks—I think by the time he was robbing the first bank his self concept was severely damaged and some of the defense against the damage was grandiose, which means it is like the superman fantasy about himself leading him into actions in a careless way like robbing a bank where he can be in an instant successful and powerful in a primitive way.

Q. Slow down and give that a little more in layman's language, please.

A. For Mr. Burks it was looking less and less likely for him, he was going to be the kind of son that would please his parents, that he was going to be able to marry a girl, that he was going to be able to be successful in these areas.

He had already been through Vietnam and that had a certain affect on his conscience. At one point he was under a lot of stress with trying to decide what to do. At that point I think by 1972, whatever this what I call grandiose solution to him, which means he could be somebody very powerful and rob lots of money from a bank and with all that money he could solve lots of problems and if it didn't work out it would be all right because it was a self destruct part of him going over [323] there, too.

In a way that part of his conscience was still working. The prohibiting part was messed up but the punishment was active.

The part of the conscious mind that keeps you from doing something—there is another part, if you do something it may still be active in demanding punishment. Mr. Burks had a solution.

He would be punished if caught. That would suit the punishing part. If he was successful he would be grandiose, since he was feeling like a failure, being able to live up to what he tried to live up to before Vietnam and earlier on.

Q. Let's go down to the next sentence about he has turned from identifying with more positive roles such as his brothers have taken on and has chosen a negative

identification as an antisocial outcast. Would you pick up and explain that in the next sentence?

A. Yes. I said he again had given up competing with his brothers and father and the whole area of identification at this time Mr. Burks became, in a way, disintegrated, that he has a great amount of difficulty in sexual identification. By that I mean particularly very unable to form a close relationship with a woman.

He is not comfortable with sexual feelings towards a woman.

He is fearful of rejection by women, fear of revealing himself to others, fear of being ridiculed and humiliated.

Q. Do you think he ever had sexual relations with a woman?

A. That is difficult for me to say. Mr. Burks told me he had in a very casual way, limited way but he didn't go into detail on what that was and what kind of relationship.

It is my impression that if he did it was shallow and uninvolved.

Q. How about David's awareness of his problem, looking at the middle of Page 4.

A. I think he is aware that he has now twice robbed a bank to seek a solution to what I think are internal conflicts.

The first time was to achieve independence from his parents and keep himself from rejecting a girl. The second time he was more aware of how senseless the act was, having no good motive, no particular plan.

It just seems to be a way to release tension and achieve calmness.

As he decided to rob the bank again, he felt immediately relaxed and calm.

Q. Do you believe that?

A. I think the deciding to commit the act again did give him a type of calmness.

Q. What about his intellectual status?

[325] A. As I said, I examined the intelligence testing and it is my impression it is accurate.

Mr. Burks is intelligent, superior. He is very verbal. As far as the head injuries, even though the previous evaluations showed no abnormal EEG's, we know he was shown to have meningitis at one time and I think it is very difficult, there is a syndrome called a post concussion syndrome that involves people after the fact they had concussions. It is

known that their behavior has been altered. I think it is hard for us to understand what has happened. We know a concussion to the brain is damaging, there may be bleeding that results. It heals over. There may be signs of it on the brain wave test but at times it seems like behavior is altered. That is a possibility of Mr. Burks that can't be ruled out.

Q. Would you read your report on Page 5 starting with genetic and dynamic formulations.

Feel free to stop.

A. I summarized and said Mr. Burks is an intelligent young man who was raised in a good family with well meaning, successful parents and two successful brothers. He had no history of antisocial acts as a child and no history of particular trauma, above high school.

Growing up he felt competitive with his brothers in such a way that he thought it was his responsibility to keep his parents happy.

[326] He grew up with the feeling that any kind of expression of anger was a bad thing and made him a bad person. In high school——

Q. Stop there. Can you elaborate on that, why he couldn't reveal his anger and what that did to him.

A. Well, I think Mr. Burks got the impression to have angry feelings was bad, was sinful, a bad thing, particularly against his parents and that he took on a responsibility of keeping things happy in the household to the extent, as I said earlier, he would lie and keep the truth from his parents if he thought it would upset them and that as this went on this led to being very difficult to be able to express his anger directly and I think in the Vietnam experience this led to a great deal of his personality at that time.

Q. Go ahead and start with his high school.

A. I think in high school he developed an excessive interest in playing football. At many times he would subject himself to injury, trauma again and again despite the wishes of his parents he not play. Of course the parents were relutant and gave him permission but wished he wouldn't play.

During the high school years he was well liked by classmates and elected Student Council President. He did not feel that close to his classmates and did not feel that successful.

Q. Read that whole sentence.

[327] Go back.

A. He was accepted and well liked by his classmates to the extent of being elected Student Council President of his school and of all the schools in the State.

Q. How can a man who has—was he suffering from a mental disease or deficiency at that time?

A. Nothing like—no, nothing like what he has since he came back from Vietnam.

Q. Do you understand how David can be elected President of all the schools in the State of Florida at that time—

A. You mean knowing David now?

Q. Yes.

A. No, not now.

Q. Go ahead and read.

A. He didn't feel that close to his classmates and did not feel that successful. He thought his parents were disappointed in his performance as a student class leader and in his performance as an athlete.

Q. Even though he was President of every high school in the State he thought his parents were disappointed at him as a class leader?

A. Yes.

Q. Even though he was all state they were disappointed at him as an athlete?

A. That's right.

• • • • •

[330] Q. Do you know whether David was very patriotic?

A. He was extremely patriotic according to all the records and medals and his service.

Q. Would you think he would have been a good soldier?

A. In combat, yes.

Q. Go ahead.

A. As I said in the report he was able to relieve his guilt by saying it was a job. When he came back to the United States trying to work in the atmosphere here, he began to feel others were against him, this paranoia, and he again would be a failure.

He got involved with a girl and fell into conflict between the girl and his parents and developed the irrational notion that he could not possibly marry the girl and please his parents at the same time. He couldn't tolerate the situation in the military by continually being reprimanded by su-

periors over things he felt were not important. I think the head injuries and involving himself——

Q. Let's go a little slower. We are getting to the heart of it. Start right there and go on.

A. The two factors of repeated head injuries in high school and the involvement of himself in violent activities in the war both led to a loosening of his supergo structure so that he could not control himself as he had always been able [331] to do in the past.

Probably the bank robbery the first time was a solution that gave him power in an immediate way and was an action very independent from his parents, although in a very negative way.

Q. What does that mean, those two sentences, loosening of his superego structure so that he couldn't control himself as he always had been able to do in the past? The bank robbery was a solution.

A. Okay. Well, as I said, in terms of the conscience, the situations he had gone through I think in the war led to a loss of the prohibiting part of his conscience. In the past he had rage and anger, he could hold it within himself, he could express it in football and there wasn't any social or criminal act in this.

After Vietnam, after his experience there all of a sudden something like a bank robbery. Before that I think it would be unlikely that David would ever seriously think of robbing a bank.

After Vietnam it didn't seem to be that unlikely for him to do, after watching little children getting killed and stepped on, things like this.

It was probably mild in comparison to things he let himself to be involved with in the war. It seemed to be a solution I think that, as I said, it was a way to gain power [332] in a very quick way.

You could have lots of money. To him that meant power at least for a little while. It also meant he could be independent from his parents, which he wanted so much to be.

In his mind it would be him not relying on his parents for the money. With the girl friend, she could take him for a very rich person for a while or reject him if she knew he was a bank robber and he wouldn't have to go through the process of making her feel bad.

Q. Was he going to tell her he was a bank robber, do you know?

A. I don't recall how he put that.

Q. You say next he didn't mind prison and felt comfortable there, goes along with Mr. Burks' growing fear of the outside world and his own inner guilt.

Why do you think he didn't mind prison? Why would he feel comfortable?

Do you think it is true?

You made the report so it must be.

A. One is where I talked about the prohibiting part of the conscience was messed up, the punishing part was still there. He didn't mind the idea of getting punished. It would make him feel more comfortable.

The other part of it was in terms of the outside world, Mr. Burks probably had more of an awareness of his failure in [333] controlling himself and again prison would help him with that.

I think also just the idea of having to compete. Mr. Burks has talked about being more frightened. His parents mentioned to me his being frightened of him being by himself, being alone at night particularly.

He talks about what he called goblins and ghosts and things. He took a job as a night watchman. His mother told me that one of the reasons he took the job as a night watchman was because he couldn't sleep at night. He could only sleep in the daytime after coming back from the war.

Q. You talk about coming out of prison the first time and he made an attempt to enter school.

Do you recall where he went and how well he did in school?

A. It is my understanding that he went to Memphis State and was making reasonably good grades, B average at least, that he became flustrated with the situation on campus, felt again isolated, condemned the students for their drug taking and what he thought was kind of a loose living and just quit.

Q. Is David somewhat of a prude?

A. I beg your pardon?

Q. Does David have a little aspect of being a prude as far as condemning others for their lifestyle?

A. He is very harshly critical. He puts his standards on other people.

[334] Q. Go ahead with your report.

A. As I said, he talked about the school. He mentioned fears of murky water where he couldn't see below the surface, fear of attack, being alone.

His mother brought up to me something he didn't bring up, which was after coming out of prison he had the need to have a small doll with him at all times who he treated as a friend and an ally.

Q. Let me interrupt you here and ask if you can identify this?

Have you ever seen that doll?

A. Yes.

Q. Do you know if it has a name?

A. Mr. Burks' mother told me that he named this doll Elmo.

Q. All right. In your expert opinion, what is the relationship between David and the doll?

A. Well, developmentally children go through stages when they separate from their mother. The first year of life the child growing up, he is telling the world it is just he and his mother. This is the way it should be. After the first year of life the child will be able to separate from her and develop normally, has to move away from mother and many times they have what we call transitional objects that they choose that takes mother's place.

[335] Probably you all have seen Linus' security blanket. This is fairly universal, that the child will pick a blanket or bottle in some way like the mother, the touch of his mother, the mother's breast, the way the skin feels. This kind of becomes the symbol of mother and the child gradually uses that object and the need of it becomes less and less as he gets older.

It is interesting that David said he didn't seem to have one of these objects as a child, which is unusual. The odyssey is that the child can mistreat the object. He will kind of develop his feelings, being able to express his feelings, love the object sometimes and get angry at it sometimes and hurt it and it is a way to separate from the mother and get the feelings straight about the mother.

Gradually he has less need for the object.

I think later on in the life you see sometimes people picking up objects again, usually not in to unusual a way but sometimes they are unusual.

Sometimes people form perversions where they can perform only sexual satisfaction by having a certain object around them and this kind of serves some of the purposes of the earlier kind of objects.

MR. WINDSOR: May it please the Court, I don't see that this testimony relates to the defendant.

THE COURT: Well, it's not unrelated. Let's get [336] along. Maybe we will get through one day.

Q. Go ahead, Doctor.

A. After David left prison his mother said he chose the doll and kept it around with him at all times and to the extent he would complain if he couldn't have it with him and it became embarrassing for her.

He also painted a picture of the object which he showed me on a black canvas that he kept in his room. The object is what we call a prosthetic object. Prosthetic object means some reversion to the state of childhood, and David's regression is shown in this where he needs the object to feel complete.

It is like a part of him is missing and somehow this keeps him together. It is like he gives him a safe and secure feeling. It is like a two year old would feel.

I think the doll possibly could have other means. I think that is the main one.

The mother mentioned that David lost a dog in Vietnam that he was attached to, which could, I think maybe the doll could be serving David's purpose in Vietnam, going through the experiences he had, this little object had helped him feel comfortable, substituting for the mother.

I think it is a possibility that Mr. Burks' interest in children in Vietnam—I think he identified with the children—he probably saw them hurt. This could substitute in someway [337] for the children.

Q. Did he ever use that object to embarrass other members of his family?

A. It seemed that way to his mother and brother because he would have the object around with him and talk to it, she says, and it would be embarrassing.

Q. What did you say in your report here, if you would read that about his attachment to this object?

A. I said it is severely regressive and is indicative of his severe degree of ego and superego pathology.

Q. What does that mean?

A. It was—by regressive I mean developmentally he had gone back to much more like an early stage of development, the fears of being alone, psychologically it is like a child two or three and this would go along with that.

The ego and superego pathology, just the evidence again is the feeling of the lack of completeness the sign of awareness of loss of control or feeling of loss of control which the object would give him a feeling of completeness.

Q. You spoke of his prison life. Does he need to be in a highly controlled environment?

A. It seems like he is very comfortable in highly controlled environments.

Q. Such as the military or prison?

A. Right.

[338] Q. How do you think he can function at the present time as he is now living with his parents or out on the streets on bond?

A. I think he seems to function being with his mother. I don't think he is happy being with his mother. One part of him doesn't like that at all. One part, this part that has the baby doll needs to be with the mother. He can't function without her unless he is in a situation that is very structured.

Q. How does he feel towards his father? How does that affect his pathology?

A. I think he has never been able to establish a good relationship with his father. I think that part of being able to separate from the mother is being able to form a relationship with the father where he can trust and respect his father and feel respected and trusted by his father. It is kind of a mutual relationship that has to develop. I think David feels a lack there.

* * * * *

[341] A. All right. Mr. Burks is suffering from a severe degree of psychopathology.

THE COURT: And is that one of your conclusions?

THE WITNESS: Yes, sir.

THE COURT: Okay. You are stating your conclusion.

A. It is disguised in his outward manner of control and politeness. By the way, I think if you look at the Judge, he

is able to express his anger and that is something Mr. Burks has trouble with.

He is a very angry, guilty and fearful young man and when his defenses of denial and rationalization break down, he becomes more paranoid and grandiose and primitive.

[342] At these times his reality testing becomes impaired to the extent of using extremely poor judgment and becoming potentially violent and self-destructive in his behavior.

I think diagnostically he has a narcissistic character disorder with borderline traits. This means his core problem is one of self esteem regulation, that he has both ego and superego defects and that at certain times and in certain situations he can become psychotic with disturbed behavior and loss of impulse control.

The diagnostic term in the current Diagnostic and Statistical Manual of the American Psychiatric Association closest to the above diagnosis is that of Latent Schizophrenia.

I would recommend that he receive long term in patient psychiatric treatment.

Q. Moving on to one through five, I believe you said you examined them. How did you use them in your evaluation of David?

A. In general I used them to look at his intellectual status and psychological testing to give some indication of his degree of superego and ego defects.

Q. Would you take them one by one.

* * * * *

[352] A. I think the main thing that I would comment on was the drawing of a person, a woman and scene of a man by the tree. That is the main thing I would comment on.

It shows, I think, his identity, what he talks about with a man about who doesn't care what people think although he is conventional, he doesn't have worries, he doesn't have to worry about being secure or where the next meal is coming from, that picture is me, I feel like that fellow.

The significant thing about the picture is Mr. Burks—when you draw a picture it tells you about yourself. One picture you have the arm on one side and he has no fingers on one hand, and this is connected with what we called the doll earlier, kind of lack of insecurity and part of himself that is missing.

It shows up in that regard. It is kind of very obvious, like somebody almost took a knife and cut his hand off.

It sometimes goes along with what we talked about, the guilty part of himself. Sometimes you take off the hand that offended you.

It would be consistent with what I talked about earlier.

* * * * *

[354] Q. Dr. Tucker, have you formed a conclusion as to David's mental capacity?

A. Yes.

Q. May I ask you, was David suffering from a mental illness at the time of the commission of the crime?

A. Yes.

Q. What is your medical terms for that illness?

A. I would say Latent Schizophrenia.

Q. Did David know right from wrong?

A. Indirectly, yes, he knew right from wrong.

Q. Assuming that he knew what was right indirectly or otherwise, was the mental illness of Latent Schizophrenia that you testified about, was that such as to prevent or render him substantially incapable of conforming his conduct to the requirements of the law?

[355] A. I think at that time, yes.

MR. DURHAM: Excuse me, Your Honor.

Cross examine.

May the jury look at the exhibits?

THE COURT: No, sir, not while counsel is examining.

You know that, Mr. Durham.

CROSS EXAMINATION OF LANDRUM TUCKER

BY MR. WINDSOR:

Q. Good afternoon, Doctor.

A. Good afternoon.

Q. Have you reviewed the medical records of the defendant?

A. Yes, I have.

Q. Let me show you this. You have placed great emphasis on that he was a combat medic. That is his discharge. He was a Parachute Rigger. He wasn't a combat medic. Does that change your opinion, sir?

A. No, not really.

Q. Why?

A. Let's see. Maybe I didn't review this. You are saying this is what? Parachute Rigger?

Q. Yes, sir.

A. Well, I was using, of course, his testimony. He told [356] me he didn't go into the situation as a combat medic, he was put into that situation temporarily. That may be erroneous.

Q. It also listed the education he got in the army, didn't it, and there is nothing in there about combat medic?

A. That's right, but he told me he wasn't trained, it was a temporary sort of thing.

Q. Do you believe everything he told you?

A. No, I don't.

Q. Did he tell you he bought movie tickets to fool his mamma?

A. Yes, he did.

Q. How did it come that David Burks went all the way to Carolina to find a psychiatrist?

A. He knows me.

Q. Who does?

A. Mr. Durham.

Q. Who?

A. Mr. Durham recommended me to Mr. Burks.

Q. How does Mr. Durham know you, Doctor?

A. We are friends.

Q. How long have you been friends?

A. For several years.

Q. How long?

A. I would say about ten years.

Q. Where did your friendship begin?

[357] A. We both grew up together in the same town.

Q. Now, sir, are you familiar with the Diagnostic Manual of the American Psychiatric Association which you are a member?

A. Yes, I am.

Q. I looked into it and under schizophrenia, latent type, the words saying, this category is for patients having clear symptoms of schizophrenia but no history of psychotic schizophrenia episodes. Is that correct?

A. If it says it there that must be what it says.

Q. Look at it and state whether it says that in the first sentence.

A. Okay. It says no history of psychotic schizophrenic episode.

Q. Yes. You say David couldn't conform his conduct to

the requirements of the law which he is charged with violating.

A. That is my impression, yes.

Q. What law is he charged with violating?

A. Well, you may have gotten me there. I presume when he robbed the bank that was against the law. That is the law I am thinking about.

Q. Is that the law which you formed your conclusion in answer to Mr. Durham's question? Is that the law you had in mind?

A. Well, there were two things when he came into the situation here, there was something about a cab driver and the [358] bank robbery. It was the bank robbery I was thinking about.

Q. Did Mr. Burks tell you about the gun he had?

A. Yes. Well, let's see. No, I don't think he did specifically.

Q. He didn't?

A. But I knew about the gun.

Q. Let me ask you this question.

When David Burks went into the bank with the gun, if the people there had resisted him would he have shot them?

A. It's my impression he wouldn't have.

Q. He would not have? So you are telling the jury he could conform his conduct against shooting people but not against robbing banks?

A. That's right.

Q. Have you ever been in the military service, sir?

A. Have I been in the military service?

Q. Yes.

A. Yes, I have.

Q. What service?

A. I was in the Army and Air Force.

Q. Were you connected with any particular part of the psychiatry department at the University of Carolina?

A. Yes.

Q. What particular part?

A. Child division.

[359] Q. Child psychology?

A. Yes.

Q. You didn't tell Mr. Durham that when he asked you?

A. No, I didn't. I should make it clear though that I am

only board eligible for child psychiatry and I was board certified in adult psychiatry.

Q. Obviously—I won't say obviously—isn't it true you voiced great familiarity with child development concepts here today?

A. That's correct.

Q. And you attributed it to this defendant, haven't you?

A. That's right.

Q. Sir, I have here a certified copy of—medical records certified to by the Chief of the Army Reference Branch and there is a letter I would like to read to you and it posses a form of hypothetical question.

This letter is purported written 26 August, 1971, by Major Jan L. Semecal, Director of Military Training of the Military Academy Preparatory School, Fort Belvoir, Virginia. Subject, SP4 David W. Burks and his service number.

On 18 August, 1971, I interviewed SP4 Burks in an attempt to pinpoint the reasons why he had submitted his resignation from the United States Military Academy Preparatory School.

In his resignation SP4 Burks had casually mentioned [360] a personal problem, but had capitalized on a series of medical problems to include hearing loss, color blindness, frequent headaches, and a bad knee which, in his opinion, disqualified him from West Point.

My office checked with the medical examination section and found that SP4 Burks was qualified for West Point.

After careful consideration of the results of SP4 Burks' interview, I am of the opinion that SP4 Burks regrets his decision to reenlist for six years in the Army and is determined to get released from his contract.

I am certain that he will pursue an effort to be declared medically unfit for service. If this course of action is not successful, I believe that he will attempt to be discharged by administrative actions because of excessive disciplinary violations.

I believe that SP4 Burks will go AWOL a number of times or fail to perform his duties properly until action to separate him becomes necessary.

SP4 Burks told me that he wants to marry a woman who is now married to another man has his (Burks) child. He

further stated that he will let nothing stand in his way and has no intention of fulfilling his six year obligation to the Army.

Are you surprised to hear that, sir?

A. At that time, no, not really.

[361] Q. Is there anything about this letter—and assume this hypothetical question—that maybe you would like to reconsider or restate your assessment of Mr. Burks?

A. No. I think it sounds like we mentioned a couple of times, paranoid, suspiciousness, grandiosity. That comes out in the letter there.

The preoccupation that he talked about, self-esteem. It is particular with patients with narcissistic character disorders, which is the informal diagnosis I used. They get into more problems with that type of illness.

Q. Well, sir, I don't have your qualifications but I am hard put to find any indication of grandiosity in this letter and I ask you to do so.

A. He will let nothing stand in his way, he will do anything to achieve his goal. That is the kind of statement——

THE COURT: Can't we get along a little bit, Mr. Windsor?

Q. On Page 4, Doctor, in the next to the last paragraph you say in the second bank robbery he was more aware of the senselessness of the act, having no good motive and no particular plan.

If he learned he did have a motive and quite an extensive plan, would it make any difference to you?

A. In terms of the final diagnosis, no.

Q. Do you think he is a social misfit?

[362] A. I am not clear how you mean that.

Q. You called him a social outcast, antisocial outcast.

A. In terms of his identification. His role of a negative identity, yes, antisocial outcast is the term I used. I guess.

Q. Did you identify with Mr. Burks when you interviewed him in anyway?

A. Did I identify with him?

Q. Yes.

A. I think with some of the feelings that came up, yes.

Q. What feelings?

A. His feelings I think in Vietnam.

Q. You were opposed to the war?

A. My feelings about the war were mixed.

Q. You testified you felt after he robbed the bank he got a feeling of calmness and was satisfied.

A. Yes.

Q. Why didn't he stop when the policemen were chasing him and trying to pull him over?

A. I am not sure how that is necessarily connected with the situation to rob the bank. I think at that time it is hard to speculate but we know he was—I understand he was getting shot at. It didn't seem to be a great concern, his life, for himself at the time. I think it fits in with some of the self destructive aspect.

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CROSS EXAMINATION OF KENNETH J. MUNDEN

By MR. DURHAM:

Q. Dr. Munden, is it true that you are a resident member of Tennessee, graduate of St. George's College in England, went to medical school at St. Bartholomew's Hospital in London, Graduate Medical School of Medicine in the University of Madrid, Spain, did your internship at St. Luke's Hospital, Chicago, and you have been a Menninger psychiatrist? Is that true?

A. That's correct, sir.

Q. We are trying to move along here.

You have been a member of the Senior Staff at the Menninger Foundation at Topeka, Kansas?

A. That's correct.

Q. And you have been a consultant for the United States Department of Justice, for the United States Attorney's office in the City of Memphis?

A. That's correct.

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[369] Q. Would you read your report. You have a copy of your report dated January 16th in front of you?

A. Yes, sir.

Q. If so, will you read that into the record, please.

A. This report has been prepared at the request of Mr. Bart Durham, Attorney at law, counsel for the above-named defendant charged with bank robbery and kidnapping.

The report incorporates the following: psychiatric interviews with Mr. David Wayne Burks, his father and his

mother, a psychological report—see enclosed copy—prepared by L. D. Hutt, Ph. D.

In addition, the undersigned has reviewed the documents listed at the end of this report.

Mr. David Wayne Burks is a stocky, muscular, neatly-dressed twenty-four year old white, single male who is intelligent, well-educated, alert and cooperative. His tendency to be overpolite and ingratiating was immediately apparent.

With support and encouragement two psychopathological elements became evident: first, the mood was entirely inappropriate in the light of his realistic situation, inasmuch as his affect expressed humor and at times euphoria and at no time did he express the natural feelings one might expect such [370] as depression, uncertainty, and anxiety.

Second, he conceptualizes himself exclusively as a man who can handle anything, a superman in fact. Given encouragement he becomes grandiose, delusional, paranoid in his thinking.

Despite the reams of letters describing Mr. David W. Burks in glowing terms, the fact remains that from a reality point of view his life has been an absolute failure. He has never completed anything. The criminal, antisocial acts certainly do not reflect the mastermind he claims to be, since he was apprehended and charged.

Last but not least, as acknowledged by himself, his war experiences simply gratified sadistic, destructive impulses regardless.

As a result of these two distinct personality traits, namely his inappropriate feelings and his delusional ideas of grandeur, his judgment can be seriously impaired, particularly in his perception and level of relationship. That is say he is quite convinced he is very shrewd and can [illegible] and manipulate anyone he wants to. This is correct when the relationship is very superficial and distant. However, when a measure of closeness is obtained, his shrewdness dissipates to reveal an individual who knows little about human beings, hence his judgment fails.

It is my considered opinion that we are dealing with [371] an individual who is emotionally very sick and has been disturbed probably from late childhood or early adolescence. He has coped with his severe disturbance by using a front that is nonetheless brittle which would disintegrate if

anyone chose to get close to him emotionally. Hence his lonely existence.

Moreover, because of his high degree of chronically-contained frustration, I consider him potentially dangerous and in need of long-term, inpatient care in appropriate psychiatric setting.

It is signed by me.

Q. Doctor, as a result of your examination of David, have you reached a conclusion as to whether or not he was suffering from a mental illness at the time of the commission of the crime of bank robbery?

A. Yes. Since I considered it has been an illness since either childhood or early adolescence.

Q. What is your diagnosis and what is the psychological term, psychiatric term for David?

A. I would consider him a paranoid individual as opposed to a paranoid schizophrenic.

Q. In your expert opinion was this mental illness such to render him substantially incapable of conforming his conduct to the requirements of the law that he was charged with violating.

A. Yes, sir.

[372] Q. Would you explain that answer.

A. Mr. Burks is of the opinion in terms of his responsibility that applies to others doesn't apply to himself and hence—may I restate that?

Q. Yes.

A. Would you ask me the question again because I want to make a point here.

Q. You told me his mental illness was such that you answered yes, his mental illness is such to render him substantially incapable of conforming his conduct to the requirements of law that he is charged with violating.

A. Yes.

Q. Was he substantially able to conform his conduct so he wouldn't rob that bank?

A. No, I don't think he was capable precisely for that point.

Q. I asked why in your opinion can't he?

A. In my opinion what conduct is appropriate for others doesn't apply to him. This is a typical paranoid trait, by the way.

MR. DURHAM: Excuse me just a minute, Your Honor. You may cross examine.

[373] CROSS EXAMINATION OF KENNETH J. MUNDEN

By Mr. Windsor:

Q. Good afternoon, Doctor. You say you don't think David Burks knew what he did was wrong on that afternoon?

A. I think he knew what he was doing was wrong but the point I wanted to make is that by virtue of the fact he is a paranoid individual he always excepts himself from having any particular situation. In other words, anybody else doing this act would be wrong but as far as he is concerned, no.

Q. Well then did he think he hadn't done anything wrong?

A. He knew he had done something wrong but the paranoid individual, you see, because of his type of thinking will justify, rationalizing logic. In his case this is wrong but explain why this is a point of view accepted by others but don't apply to him.

Q. I think I understand that. Did you place much emphasis on your diagnosis concerning his war experience?

A. Some. My approach to David was—because I had received quite a bit of information about his background, many reports, one thing that struck me was that there was very little information about his personal, intimate life which I felt was rather important to look into, and this is one area in which I focused on, his own personal life.

To that extent we did discuss a little bit about his war experience.

[374] Q. Did the little bit you discussed weigh heavily in your diagnosis?

A. In one aspect, yes.

Q. Please explain.

A. According to him this was the best time he had ever had in his life in terms of looking back on your life, what time of your life do you feel was the most enjoyable, the best in your life.

Q. When you examined and interviewed David, he told you he was sane—he felt this was the best time in his life.

He in so many words told you he was sane, didn't he?

A. Oh, yes, that is what a paranoid claims that they are sane. If you get as close as you can to a paranoid individual

and for a time I think I did get quite close to him, they feel that definitely they are sane, healthy and nothing is wrong with them, it is everybody else that is wrong.

Q. Was he psychotic at the time he robbed the bank?

A. No, sir. I am sorry. Would you say that again.

Q. Was he psychotic?

A. At the time he saw me?

Q. No, sir, at the time he robbed the bank.

A. Psychotic in the sense he has been a paranoid individual all his life.

Q. You say paranoid as opposed to paranoid schizophrenic.

A. Yes.

[375] Q. Doctor, are you familiar with the Diagnostic Manual of the Mental Disorders of the American Psychiatric Association?

A. Yes, I am.

Q. Under Section 297 entitled Paranoia the last sentence in the description here says, in spite of a chronic course the condition does not seem to interfer with the rest of the patient's thinking and personality.

A. Yes, that's correct.

Q. Now, the sentence before that—and there are only three sentences—says that the patient considers himself endowed with unique and superior ability.

A. That's correct.

Q. That's correct, isn't it?

A. Very intelligent individuals, very intelligent.

Q. Apparently it is the feeling of the American Psychiatric Association that the condition does not seem to interfer with the rest of the patient's thinking and personality but he does feel unique and superior ability?

A. That's correct.

Q. Well then I would have to ask you is the rest of his thinking and personality mean that he does know right from wrong?

A. No. As a matter of fact I published three papers on the problem of the paranoid, one which I presented to the International Congress of Psychiatrists because the paranoid individual is very intelligent, very well integrated.

[376] The one area that is very disturbed is the affective area, to that extent what you find this is what paranoid refers to, so called delusional thinking. This is one area that

is affected there; the fact that their ideas, beliefs are totally unrealistic.

Q. All right. In your report you say twice, once you say with support and encouragement two psychopathological elements became evident. What sort of encouragement?

A. I discussed with him the very fact that it seemed like his life had been a very lonely one, a flustrating one, very unhappy one and for a considerable amount of time he was very uneasy about my trying to get close to him.

As a matter of fact, it was only in the latter part of the interview that he began to open up a little bit in terms of his own intimate thoughts, his perception including myself. I wouldn't do this because it is vicious, but with a patient of this type if you are trying to become affectionate with them they can be grossly delusional, very distrustful as opposed to someone else, they get to know you a little bit, show some affection and they will respond.

Q. Did he recall in very good detail the events of the robbery?

A. Pretty clearly and directly as he did other events in his life.

Q. All right, sir. Sir, the Diagnostic Manual says [377] that paranoia is an extremely rare condition.

A. Yes. May I add to that?

Q. Please.

A. It is even being questioned because it is being theorized that the state of paranoia is on individuals by virtue of the fact that they are paranoia never involved in courts so it is quite a hypotheical type diagnosis. However, you notice that there are levels, diagnostic levels under the paranoid label.

Q. Yes, but I listened closely and you distinguished your paranoia from paranoia schizophrenic.

A. I referred to him as a paranoid personality or paranoid individual.

Q. This manual of the American Psychiatric Association says that is extremely, extremely rare.

A. Not the paranoid personality. Paranoia.

Q. Did you write an article entitled Consideration of the Paranoid Problem in the Psychiatric Practice?

A. That's correct.

Q. And in the first paragraph did you say, as you know

the paranoia problems is the most common and difficult one encountered in the psychiatric practice?

A. That's correct.

Q. And in the last paragraph did you say, unfortunately the physician, psychiatrist today is so bent on proving himself [378] right that he has little time or inclination to give the patient the opportunity to prove himself wrong?

A. Correct.

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[387] DIRECT EXAMINATION OF
RICHARD J. FARRER
REBUTTAL

BY MR. WINDSOR:

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[390] Q. Do you think David Burks was psychotic when he came to [391] your office?

A. No.

Q. Do you think he ever has been psychotic?

A. I don't think so.

Q. Please explain to the Court and jury the method you employed to reach your diagnosis and the reasons you have for feeling competent in it.

A. The methods I used are the methods that most psychiatrists use. We try to do two things and hopefully they mesh together. One is by taking a careful history to observe patterns of behavior, understandings of how people perceive things, certain values they hold, manners in which they deal with things like anger, feelings toward other people, how they regard themselves, all these ways to get an idea what this means from as long as they can remember right up to the present.

The history is very important.

The second thing we try to do at the same time is make an observation of what that person is like at the time of the examination, how anxious are they, how able are they to understand what I am saying, how coherently do they think, what their thoughts are like, what their feeling state is like and how they deal with it; a sense of what the interaction of what that person and myself might be, a measure of intelligence and measure how valid I think the overall information is.

Q. Did he describe to you the details of the bank robbery?
[392] A. Yes, he did.
Q. Did he have good recall?
A. Yes, sir. Here again when someone tells me something I always have to say, how would someone else have seen it or is there another story.
The information he told me was consistent with the information supplied to me from the Tennessee Bureau of Investigation describing a certain series of events. He was able to describe in detail what he did and certain of his thought processes during the week, the days right before the bank robbery, of the day of the bank robbery and events subsequent to the bank robbery.
He was able to detail what he did and some of his reasons for why he did what he did.
Q. Doctor, was the fact that he did recall things in detail immediately before the bank robbery, a few days before the bank robbery and on that following day, was that significant to you in your diagnosis?
A. Yes.
Q. Doctor, is there much disagreement within the field of psychiatry and medicine generally as to the term mental disease or mental illness?
A. Yes, there is. May I explain?
Q. If you please.
A. Let me start from this kind of proceeding and then [393] expand out. We start with sometimes if two or three people examine the same person, we start out getting different information that sometimes consciously and sometimes unconsciously a person might tell an examiner that person thinks is going to be friendly towards their case and certain things and might not tell who they perceive to be unfriendly toward their case other things. There is a certain kind of possible difference in information that each individual psychiatrist might be presented with. That is the first thing.
The second thing is that psychiatrists and in psychiatry there are different frameworks or ways of understanding problems that are being used that not everyone shares exactly the same understanding as to what constitutes emotional difficulties.
For example, certain psychiatrists feel that the only factors are the factors most important, the biological factors. If someone who had a grandmother and mother who had

something that we feel has strong genetic or biologic contribution like schizophrenia they would say that is an emotional problem. Other people say that is really not very important and that is hard to prove.
It is what happened in the family setting that is important, what the mother was like and father was like and that particular child was like and how they acted and biology is not too important.
[394] The other people would say family is somewhat important but the social class and social environment is more important.
There is that enormous difference in framework. More than that there are other ways of conceptualizing it.
I think you might be familiar with, I am okay, you are okay or other kinds of books. There are lots of different ways to try to understand how people think and deal with their feelings.
So, there is no one way of looking at things. It is important for the Court and the jury to understand that many times if they are asked to see conclusions from five different psychiatrists they might be using five different frameworks to understand things. Rather than the Court being able to say and jury being able to say that they are comparing apples and apples, they may be comparing apples and oranges.
Within psychiatry there is a big difference as to what the legal implication of mental illness is. We have certain people that are very bright and I think honest and ethical who have a firm belief that there is no such thing as mental illness.
This is, for example, Dr. Szasz who wrote a book called The Myth of Mental Illness. He doesn't think it exists at all, that people have psychiatric problems as a way of not being personally responsible for them and dealing with people in a straightforward way.
[395] There are others that say mental illness is somebody who is psychotic.
There are other people who would say that mental illness is anything that appears in the diagnostic and statistical manual. This is a manual where we have numbers that go behind each diagnosis.
Now, the statistical manual changes. It changes because of the change in scientific information and it changes from

a change in exactly who was on the board, who makes up these diagnosis.

These diagnosis go from one extreme to say someone who is manic depressive and psychotic and someone who, for example, gets extra nervous before getting married. That would be called a situational reaction of adult life, to somebody psychotic on one hand because they all appear in the psychotic statistical manual they are all treated the same.

I think the whole issue of what mental illness is is not very clear within psychiatry itself, sometimes the unclearness of what the law wants defined as mental illness.

Q. Thank you, Doctor. Your example about a person getting married, it is even possible to observe a person who testifies on a witness stand in court who might be very nervous and find the word and category in the diagnostic manual?

A. Sure.

Q. And describe mental illness to that person at that [396] time and place?

A. If they say mental illness appears between these two covers of the book, I would say yes.

Q. What word would you use, what words in the field of psychiatry would you use to describe David Burks to another psychiatrist?

A. I would use two sets of framework. The framework I would use in understanding Mr. Burks, I would call him a narcissistic personality with socio-pathic features. If I wanted to use the book with the numbers and labels, I would say that he was a passive-aggressive personality with sociopathic features or anti-social features.

The whole business about narcissistic personality is a relatively new concept; that psychiatry is a new science, relatively seventy years old or so.

The diagnosis of narcissistic character first being considered in the early fifties with much seriousness and papers and understanding about it have only become intense in the last three or four years. Lots of psychiatrists use this framework to understand people and others don't.

I take the field it has the capacity to explain more than other frameworks. So, I would go ahead and use that.

We don't have in the diagnostic and statistical manual narcissistic personality. That doesn't appear.

Some people will say, well, it ought to be coded out [397]

as Latent Schizophrenia. That doesn't make any sense to me. What latent means is, for example, if I have latent diabetes, sugar diabetes and put on one hundred pounds and eat sugar and drink Coca Cola and I have latent diabetes, I will get diabetes.

People with narcissistic personalities, according to—I will use their names. Their names won't mean anything to you, the Court or Jury, Kohut and Kernberg, particularly people with narcissistic personalities do not become schizophrenic under stress. They may become psychotic but don't become schizophrenic. There are two different groups.

I chose to call him in something where you could have a number put after it, passive-aggressive personality with antisocial features.

What does that mean? It means he has difficulty dealing with his anger and he has a difficulty in the antisocial aspect in dealing with people consistently, and trust, he has a distorted self-concept and distorted sense of values when it comes to other people in vague terms.

I can explain that later if necessary.

Q. Did you feel that David Burks had a problem with his parents?

A. Well, yes, I did. Now, I did not examine Mr. and Mrs. Burks and his information about them was nil. He said I can't describe my parents in personal terms. I said, tell me about [398] your mother or tell me about your father. He said, I can't do that. He was able to describe them in roles. My father is an attorney and works for Howard Johnson's and my mother is a school teacher; and he was able to say a little bit about them. He wasn't able to tell me anything that would give me a picture of them as a person.

People will generally say, oh, my father was an angry old cuss or my mother was just as nice and everybody loved her and she never met a stranger or things like that.

Mr. Burks wasn't able to do that with me. I don't have any direct information about Mr. and Mrs. Burks.

I infer that there were problems between Mr. Burks and his parents. Because I didn't see that and he didn't give me further evidence, I can't state that as a fact. I would say that is an enormous possibility because every evidence we have about narcissistic personalities is that there is difficulty in the early mother-child, father-child relationship.

It also can be made by relationships outside the family after the person gets away from the family. It doesn't stop.

Q. Doctor, have you since then—

THE COURT: Let's stop for just one minute, Mr. Windsor. We had a psychiatrist in here and he used the word narcissistic personality but the jury has never been told what either one of you mean by that word. I think the jury should be told that right now.

[399] A. Narcissistic personality means this: It is a condition where a person has a distorted sense of self. They tend to see themselves as more important, bigger, able to do things better than anyone else around. They need lots of reassurance from other people that they are great, that they are special, that they are important.

At the same time they also lack a consistent ability to make a loyal, reciprocal, mutual relationship with someone else.

The people are there with these kinds of people to supply a sense of self or to supply an impression of how they are, particularly with regard to importance. They aren't there to share things, they aren't there to get involved with dealing with part of themselves in the usual way that would be considered less than optimal. That is the essence of a narcissistic character.

In psychiatry we try to say, is there anything else we can put on here as an explanation to understand what these words mean. All that antisocial or socio-pathic means is that these kinds of people tend to manipulate, exploit, frequently lie, not be honest with people to get to their own ends. Is that understandable?

Q. Dr. Farrer, within your experience is it perfectly possible a person with narcissistic personality to pursue this need of assurances without breaking the law?

[400] A. Yes.

Q. Can you give us some worldly examples?

A. I was going to say we see it in politics, but I think lately there is a lot of suspicion as to whether they break the law or don't. I think frequently people who are in successful places, one of the reasons they are there is not only because they like what they are doing, it is important for them to get there to be a big shot, to be big cheese. You see it in certain kinds of business people, for example, sometimes people from the theatrical world where they literally get to be on stage and then are able to off stage always be special, always be the center of attention.

Many of them, not all of them—I haven't examined any of them professionally—from the information I can gather, I think many of them would certainly qualify for this.

Q. Do you think that is why David Burks robbed the bank?

A. That is one of the reasons he did and another reason he robbed the bank is to get caught.

Q. Did you come to a conclusion from what he told you about why he would want to get caught?

A. To punish himself for doing something that was wrong.

Q. So he did know the difference between right and wrong in your opinion?

A. He said to me when I asked him about the circumstances surrounding the robbing of the bank, I knew what I was doing. [401] I knew it was wrong.

Q. Did you believe him?

A. Yes. It's important to understand that Mr. Burks has had a pattern of dealing with internal difficulties not by doing lots of antisocial things. On two occasions he has robbed banks and he robbed a bank to solve inner problems. An example would be this. It may be simplistic, but here is an example.

A young boy is at school. He had a hard day at school and is feeling flustrated and perhaps humiliated. On the way home he sees a cat and picks up the cat and throws it in the stream, because then someone else feels worse than he does and he is perhaps more powerful for doing it, and so forth.

He starts feeling remorseful about the cat on the way home. He starts feeling bad about himself and that is not enough. He goes home and sometimes consciously and sometimes unconsciously will go do something that he knows is wrong. Like his mother said, don't come across the living room rug with dirty feet.

So, he walks across the living room rug. He gets punished. Mother thinks she is punishing him just for dirtying the carpet. She doesn't know that he has done the cat in the creek.

So, the extra punishment, mother settles the score with the young boy.

[402] I think Mr. Burks was wanting to at one time be important, carry something off, achieve something with the sense of bravado and then get punished for it.

Q. In your opinion and based on your examination, was he able to conform his conduct to the requirements of the law on the day he robbed the bank?

A. In a perversed way, yes. He was able to conform his conduct to the specifics of the law to get caught.

Q. So he had to take the law and right or wrong in consideration in order to rationalize that out?

A. To my understanding, yes.

Q. I am pointing here. Can you see this doll here that is made out of yarn and has yellow hands and green and purple hair?

A. Yes.

Q. Did David Burks ever tell you anything about the doll?

A. No, he didn't.

Q. Doctor, from your explanation to the jury I would assume you would be reluctant to use mental disease in describing someone?

A. Yes, I would for the reason I explained.

Q. Nonetheless, do you think—and you answered yes but I will ask you again—do you think on the day of the bank robbery David Burks knew the difference between right and wrong?

A. Yes.

Q. Do you think knowing the difference between right and [403] wrong he was able to choose right if he wanted to and conduct himself in accordance with the law?

A. He was able to choose wrong because he wanted to in order to get caught.

Q. Could he have kept himself from robbing the bank?

A. Probably not.

Q. At that time?

A. At that time.

Q. What if a policeman had been standing there beside him?

A. If a policeman had been at his elbow, I don't think he would have done it because I think he wanted to do something and do it right and then get caught, not just to botch something up. I think he wanted to execute something, do it and then get caught.

Q. So he had a freedom of choice?

A. Well, he had a choice. How free it was, I don't know.

Q. Did he tell you he looked at more than one bank?

A. Yes, he did. He said he liked that location for some reason I can't recall.

Q. Do you think if the people in the bank had resisted him he would have shot them?

A. No.

Q. Do you think then he would have been able to bring [404] his conduct within the confines of the law against shooting people?

A. Yes.

Q. If a person diagnosed him as being a paranoid schizophrenic, could you agree with that diagnosis?

A. No.

Q. For what reason.

A. Well, if these these terms have any kind of currency, we have to agree on what it means. Paranoid schizophrenia means that somebody is psychotic, it means they have a tremendously reduced ability, that their feelings state when you examine them is very flat, very blank, that they have a thinking defect.

It is depending on whose criteria you use but there are usually things like looseness of association where a person will start talking about one thing and jump from here to there to here to there and tend not to make sense.

They tend to frequently have auditorial hallucinations that are usually delusions where they will believe somebody is against them and somebody is persecuting them because they have done something bad.

I could not establish that. To be sure Mr. Burks is at times paranoid but that is quite different than being paranoid schizophrenic. Paranoid means a person thinks that more people are negative against him.

[405] Psychologically we try to understand—a person would deny—for example, I would deny angry feelings within myself. If I were angry I would say, I am not angry. You are mad at me, am not mad at you. Lots of people can be paranoid without being paranoid schizophrenic. They are not the same thing.

Q. In your opinion and your experience, Doctor, how many people are there working around the general population that are full of anger and have problems of anger and tendencies toward paranoid for that reason?

A. Hundreds of thousands.

Q. Are they responsible for their conduct?

A. The court holds them to be so.

Q. Do you think on October 23rd David Burks should be held responsible for his conduct?

A. Yes.

MR. DURHAM: Objection. Ask him to restate the question, more definition of the word responsible.

THE COURT: Well, I think the jury understands what the doctor has said, that he thinks on that day he made a choice. He doesn't know how free the choice was but he made a choice of one kind or another.

He made a choice to commit an offense because he wanted to be caught and under other circumstances he might have made a choice not to commit the offense if the circumstances were different?

[406] THE WITNESS: Yes.

Q. Doctor, there has been testimony in the trial about George Washington's birthday. You agree that it always hasn't been observed by everybody on the same day?

A. Yes, I think that is right.

Q. I think it was a bank holiday this year—this is a hypothetical—for instance if David Burks went to the bank, went there on George Washington's birthday, the door was locked, would he have broken the window and robbed the bank under an irresitible impulse?

A. No. I think he would have gone home.

MR. WINDSOR: Counsel may ask.

CROSS EXAMINATION OF RICHARD J. FARRER

BY MR. MOON:

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[410] That still means—for example, I was able to get by talking to Mr. Burks by himself on two occasions, I reviewed my notes and compared them against the psychiatrist from North Carolina. We got essentially the same data. There wasn't much variance.

I didn't get the information about the doll but I got enough other significant data that at least with the North Carolina psychiarist we agreed that there is a narcissistic problem.

I tend to feel there is more of a tendency towards anti-social behavior than he does. That is the main difference.

Q. Going back to my question, Doctor, realizing that somebody is coming there under a court order and basing—

THE COURT: He didn't say under a court order. He said under the situation of a trial, which would be if he is charged for his own defense or by the government. Is that what you are saying? Would there be a difference?

THE WITNESS: I couldn't care if you sent him or Mr. Windsor or anyone else sent him. Still it's not an optimal situation. Anybody who sees him is going to get information that is not the same quality as Joe Jones walking off the street and saying, I am hurting, I want to see you, I feel it is going to be confidential, you are not going to tell [411] my husband or wife or child; or an adolescent, you are not going to tell my parents.

If I see an adolescent and that adolescent gets the notion that what they tell me is going to mama or daddy, I don't get any information at all, or not much.

Q. May I interrupt. I understood when you said it the first time.

Doesn't this nevertheless prohibit you from making an adequate, thorough examination of that young man?

A. I can usually make an adequate one. How thorough it is depends on how far you want to press through with this. I will say if you send him to me or Mr. Windsor or anyone else—

Q. You can't adequately examine the man?

A. I think so.

Q. It depends on how far you go back and how much time you spend, and so forth?

A. And what kind of relationship you get with him.

Q. You spent two fifty minute sessions with him, is that right?

A. That's right.

Q. Did not Dr. Munden and Tuck also receive David under the same situation as you received him?

A. Yes.

Q. Okay. Are you aware of how much time Dr. Tucker spent with David?

[412] A. Yes. He documented it here in his letter.

Q. I can tell you. I went to Memphis with him. We spent all day there. Do you think spending anywhere from six to

eight hours with a patient would be more adequate in their examination than two fifty minute sessions?

A. We came up with essentially the same diagnosis. We came up with the same conclusions and same data based upon which to base a distorted self-concept and distorted relationship with others and conflicts wtih anger and conflicts about the bank. Now, what I would have gotten—might have gotten—Mr. Burks is somewhat guarded. He doesn't like people to get too close to him.

Q. Everybody said that. You agree with that?

A. Sure. Under those circumstances it takes sometimes more than six hours to deal with that, whether six hours in one day or six hours once a week for six weeks or whatever.

Q. And also Dr. Tucker who was able to talk to him in his home environment with his parents and one of his siblings. Do you find that to be significant?

A. It could be helpful.

Q. Do you think it could have been helpful to you if you were doing it?

A. It could have been helpful.

Q. You just said something that is curious to me. Both of you all said essentially the same thing. I agree, I heard [413] you and Dr. Tucker mention narcissistic.

A. Narcissistic personality. He stresses a different aspect than I do.

Q. If you both reached the same conclusion and correct me if I say something wrong because I am not that familiar with psychiatry, you say that he was able to control—Dr. Tucker said he couldn't control his conduct on the day the bank was robbed and you said that he was able to control himself in a perversed sort of way.

A. Perversed in that he was able to carry out an antisocial act.

Q. And wanted to get caught.

A. Yes, sir.

Q. If that is what you mean by perversion.

A. That is what I mean by that.

Q. In a normal sort of way you and I would go in the bank, was he able to control himself in a normal sort of way?

Obviously it is abnormal to want to go to the penitentiary. I don't think anybody wants to go to the penitentiary.

A. That's not true, Mr. Moon. That isn't true at all.

Q. For normal people.

A. Not normal people People frequently and usually in certain sub groups of people want the penitentiary because they are passive people, they don't want to have to do anything, they [414] can sit in a cell, their meals can be provided and have total structure. So, lots of people want to be in the penitentiary.

Q. But these are not normal people?

A. I at this point as a psychiatrist am raising a question as to what mental illness is. I am going to have to raise a question as to what normal means. Because normal, whether I gather from the feeling of talking to the fellow from North Carolina, if his conceptual framework is similar to mine, he would raise a similar objection. What does normal mean?

Q. I can't deal with that.

A. I understand. I am not trying to make you do that. Normal to me you will have to say.

Q. If I said it it would have to be medically, is that correct, and I can't.

A. Even within psychiatry one of the things we see quickly is that normal is a very hard thing to define.

Q. I can appreciate that. In a normal sense of the term, he could not control his behavior? Would that be an accurate statement, assuming we both knew what normal meant?

I am beginning to wonder myself.

A. I don't know where we are. All I can say, he did—he knew what he had to do to get caught and he did it.

Q. He had to get caught.

A. Okay. Had to.

Q. What does had to mean?

[415] A. He had to as a way of solving a problem.

He was feeling—here is a man who wants to see himself as an important, special, successful man.

Q. Yes, sir. That is grandiose.

A. He has two older brothers that are successful. His parents are successful. He keeps getting a conflict as to doing what he wants to do and what his parents want him to do. He is doing a job he doesn't like. He thinks he should be doing what his brothers are doing.

Rather than solve it in a way that would be helpful, he gets angry, wants to do something that makes him important and he gets caught.

Q. In all fairness, let me ask you this. Maybe this could get to some sort of mutuality in the definition.

When David walked in that bank, do you think it was within his possibility, under his control to turn around and walk out?

A. Well, probably. I don't know.

Q. You testified he wouldn't hurt anybody?

A. I think probably if he thought he could achieve it and carry it off he would have gone ahead and done it, he wouldn't have turned around.

Q. He could not have turned around?

A. Would not have turned around.

Q. I am asking, could he have.

[416] A. I suppose he could. He didn't.

Q. I know. He certainly had a physical capability.

A. He is able to make choices. For example, he made the choice that, that is the bank I want, that is not, you know.

Again, choice was made. He is able to make choices.

I think if he went in there and found sixteen policemen standing there, he wouldn't have done it. He would have turned around and gone off somewhere else.

Q. Is it significant to you that he chose a Yellow Cab, a very conspicious vehicle to make his getaway?

A. He did a lot of things not to cover up his tracks, including taking dummy money, including having dummy money go off and smoke billowing out of the car.

Q. There is nothing in your testimony to indicate he didnt want to get caught?

A. Right.

Q. One doctor talked about how his mind is divided up, one is productive and the other is punishment and one made him get caught to be punished for it.

A. To do something in a certain way. To do something to achieve something special, to carry something off with flair and yet knowing that that was bad he wanted to get caught.

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[420] THE COURT: Let him answer your question one time, Mr. Moon.

The Doctor has been trying to say something. Doctor, go ahead.

A. Sure that is important. But even the drift of the in-

formation that I have gotten about Elmo sems to be consistent with the diagnosis I have made, narcissistic personality, which in fact the other doctor made with that information. We both came to essentially the same thing. He wants to stress something else, the paranoid aspect and I want to stress the antisocial feature because in my judgment that is more important.

Q. Another psychiatrist's judgment is that the other factor is important.

A. Yes.

Q. And that would lead him to say, well, because of this then it is mental illness and you are saying since—

A. No. As I said in my rather lengthy statement to the Court and jury in the beginning, mental illness is so many [421] things to so many different people that the jury is faced with a very difficult situation as is the Judge, as is the psychiatrist, what do you really mean by it? Nobody is saying this man doesn't have emotional problems. It is clearly documented.

That diagnosis is not the equivalent of an emotional runny nose. That has severe implications. In regard to other things I testified about, yes, he knew what he was doing, and so forth.

• • • •

[427] Q. Let me ask you this. Can a person have a severe passive personality disorder that can exist and the person still be psychotic at the same time?

A. No.

Q. You would disagree with that statement?

A. Yes. It depends on what—if psychotis means the ability for me to know this is here and what it is and operate—it is not some kind of philosophical thing, do you really exist? I don't know because of all this, because we all can't see [428] accurately.

If we talk about I know what this is and operated as such that is pretty good information it is not psychotic. By definition a personality disorder is not consistent with a diagnosis of being psychotic at the time. Now, as Dr. Munden and the other fellow both know, if they know the literature on narcissistic personality, narcissistic personality can get psychotic at times. That is schizophrenia, that is not Latent Schizophrenia, not Paranoid Schizophrenia. They are not able to.

Q. It is mental illness?

A. It is an emotional problem. It is a character disorder. Again I come right back to what I spent half an hour trying to say, mental illness means so many things. I said time and time again this is a very troubled man. He had distorted, serious distorted grandiosity of himself, seriously altered, unable to relate to people.

That is not saying he is troubled and what the court means and you mean about mental illness. I will say again until it becomes more specific, I won't say yes because it means so many things to many different people. Mental illness could mean getting extra nervous on the witness stand and having a manic—

Q. You said he was a seriously troubled man and he needs some serious help?

[429] A. Here again I have a problem. Assessing motivation for treatment is difficult.

Q. Let's assume he said—

A. Assessing motivation for treatment under forensic circumstances is even more difficult.

Q. He said, I am finally aware that I need help, serious help. Could that be what you call a motivational factor?

A. I would hear what he was saying but I would still be benevolent, skeptical about it.

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[431] REDIRECT EXAMINATION OF RICHARD J. FARRER

By Mr. Windsor:

Q. Dr. Farrer, you treated—I believe you told Mr. Moon there weren't any guaranteed results?

A. That's right.

Q. There is no guarantee he won't rob another bank if he decided he wanted to, is that correct?

A. That's correct.

[432] Q. If he went to this hospital you described for a year and in the mind of psychiatrists there wasn't any hope and they opened the door for him, where would he go?

A. I don't know.

Q. Have you known many seriously troubled people?

A. Personally or professionally?

Q. Either one, sir.

A. Yes.

Q. Such as David Burks?

A. Yes, sir.

Q. Did you know many of them who didn't rob banks?

A. Yes.

Q. Most of them in fact?

A. Right.

Q. Did David give you any reason to believe he wanted treatment?

A. Well, he said at one point he did. I am not sure what that meant. I had to be skeptical of understanding what that meant.

Q. Do you think this defendant is a manipulating person?

A. He can be, yes.

Q. When he wants to get his own way?

A. Many times he demonstrated this, yes.

Q. I believe Mr. Moon referred to you as a government psychiatrist. Are you a government psychiatrist?

[433] A. No, sir. I see my role here as I am an expert witness to the Court. If you pay me that is one thing, if someone else pays me that is another thing.

Q. Mr. Moon brought out the doll and asked you some questions, what if you knew this and that and he also said, you know Dr. Tucker visited in the family home.

Let me ask you this. What if every bit of information you got about the doll came out of the mother's mouth and not David's mouth and wonder if Dr. Tucker was the only psychiatrist that went to the home and only one that talked about the doll? Do you think that would be significant?

A. Sure.

Mr. Windsor: If Your Honor please, Mr. Moon made some reference to the effect that this witness didn't examine the psychological reports. I would like an instruction the defendant was under a duty under Rule 16 to make them available so he could examine them.

The Court: We will wait.

Q. Why didn't David rob a jewelry store instead of a bank?

A. I don't know. This is something that this kind of behavior does, why somebody seizes on a particular symbol, sometimes this can be found out. I don't know why now. I think if he were in treatment it could be determined probably. Nonetheless, I don't know how.

[434] Q. What you know now, do you think it is possible because he robbed a bank several years ago and got some results he wanted—

A. Oh, surely, surely that. Sure he has a pattern now of solving internal problems by robbing a bank. He robbed two of them. I don't know why more than the fact this is a pattern for him. I don't know why he chose the bank in the first place, not now but three years ago.

Q. If he chose a jewelry store and a policeman chased him, he would have wound up in court too?

A. Right.

Q. He could have chosen a jewelry store?

A. Yes.

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[463] DIRECT EXAMINATION OF
DENTON BUCHANAN, REBUTTAL

BY MR. WINDSOR:

Q. Dr. Buchanan, please tell us your educational background.

A. I have a Ph.D. Degree from Vanderbilt University.

Q. In what field?

A. Clinical Psychology and licensed in the State of Tennessee as a clinical psychologist.

Q. Have you been certified in any board area?

A. No. The boards in psychology, you have to be five years beyond your Ph.D. and I have four. I am not eligible until next year.

Q. You are only one year away from eligibility?

A. One year from now.

Q. Do you know David Burks?

A. I have evaluated Mr. Burks. I did not know him previous to that.

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[481] Q. Please read your evaluation report.

A. This is a—

Q. Beginning with behavior there.

A. Excuse me. Patient was prompt, pleasant and cooperative. He openly described his bank robberies and attitudes toward his family and life in general.

Can you hear me?

The patient appears to be an impulsive, angry and egocentric individual who lacks the capacity for emotional interaction with others. His MMPI profile, Minnesota Multiphasic Personality Inventory Profile 4 is valid and indicates the potential for an social or antisocial behavior. Such people——

MR. DURHAM: May I interrupt?

[482] You mean to say a?

THE WITNESS: I am sorry. I didn't hear you.

Q. asocial rather than an social.

A. Did I say an?

Q. Yes.

A. Asocial or antisocial behavior.

Such people often seem unable to profit from experience and may have an unusually high threshold and tolerance for punishment.

The projective material indicate his underlying anger and continual effort to avoid emotional involvement. Such passivity will prompt him to utilize indirect means to express his hostility.

The primary villains in the patient's view are his parents. He experiences a great conflict toward them which he does not realize. On the one hand he desires their respect and influence, but on the other hand he is angered by their authority. He states he compromises himself to them and that they don't understand me at all and I put up with my relatives.

His successful brothers and their comparison to him as a failure is also a source of anger. The patient actively denies the influence of his family in his acting out tendencies as he lacks psychological insight into his behaviors. However, the fact that his passive-aggressive behavior is provoked by his fluctuating conflictual attitudes to his family is [483] undeniable.

The patient shows no ambition whatever to change his personality or alter his behavior. His adjective check list answered, as I see myself and as I wish I were are exactly identical.

He is without guilt or remorse and has totally rationalized his situation to an attitude where it is beyond his control.

Diagnostically, the patient can be considered a personal-

ity trait disturbance-passive-aggressive. There is no indication of a psychotic process at present or the remnants of a previous psychotic reaction. The patient's intellectual functioning is in the superior range. Estimated full scale IQ equals 127.

* * * *

[486] Q. Does that scale, that test give you an indication of whether or not a person is paranoid?

A. Yes. Thank you. This test has a paranoid scale, scale six PA. Right on fifty, right on normal.

Scale eight, schizophrenia, right within normal limits.

These six, eight and nine are the psychotic scales, [487] normal, normal, normal.

Q. Doctor, is it upon the results that you just described to the jury that you based your conclusion that David was not psychotic?

A. No.

Q. There are other basises?

A. Oh, yes.

Q. Before you leave this MMPI, let me ask you, did David ever tell you before you gave this test what his score would be on part of it?

A. He told me he had taken an MMPI previously and told me he had a 49 profile.

Q. Wonder if he had a 49 profile?

A. That would make him much more an agitated psychopathic.

Number 9 is the energy scale, how much you become overtly angry and hostile.

Q. Did he tell you that in response to questioning by him?

A. Yes. I was asking him about his previous psychological tests and what he had experienced.

Q. And then he didn't score that way at all on your test, did he?

A. Well, no, he didn't. He scored a straight four. This is an energy scale so the amount of acting out can increase [488] or decrease. This is how he was feeling at this time.

Scale 9 has gone down. It doesn't change the interpretation, it changes how overt this character disorder is.

So, an individual that basically has a character disorder can at times have the urge to act out that anger or at other times have the character disorder and not want to act it out at that time.

Q. All right, sir. I wanted to ask you a question that just occurred to me.

You saw the doll that has been testified to here in the courtroom?

A. Yes.

Q. In your opinion could David be using that doll to humiliate his parents?

A. I think that is certainly a possibility that I would like to raise. I don't know certainly what's in David's mind on that doll. It was interesting to me that the doll has not come up with many of the other investigations, psychiatric or psychological.

Q. Did David ever say anything to you about it, sir?

A. No, he did not to me, and Dr. Hutt I heard testify yesterday had not heard anything about it. It occurs to me that I wonder how important it is.

Q. Or else David would have told you?

[489] A. Somebody else would have heard about it. I wasn't in for the whole testimony. As I understand from what I heard the only person that was alerted to this was Dr. Tucker, the psychiatrist from Chapel Hill, when his parents brought it up.

I am asking more of a question. I think that is what I understood.

Q. You are stating your understanding. I can't really answer your question.

A. That was my understanding.

Q. Would you please explain the objective scoring of the test versus the subjective clinical interpretation?

A. Yes. I think this is the primary scale of psychological tests as opposed to clinical interview, which psychiatrists are at least, if not more qualified to do. Psychological tests are objective ways of assessing a person's mental status. So that as much as possible psychological tests should not be subjective but objectively assessed. So that even projected tests of scoring systems built upon experience with many different personality types can be utilized so we don't have to rely upon our own needs and our own value systems, that we can get beyond me as a person and use a scoring system and establish that.

That is why the MMPI is so valuable, because it is an objective assessment, very well validated and objective.

Subjective interpretation of any kind of tests leaves it

open for criticism in that it is the interpreter's values [490] that go into the assumptions and conclusions that are arrived at.

Q. Are there any tests which are particularly vulnerable to letting the examiner's prejudices creep in and show up on the score of the person's test?

A. Yes, projected tests in particular, tests like the Rorschach, if it is not scored, like the Human Figures Drawing.

Q. How could a Rorschach test be given and not score it, as you say?

A. By looking at the content, paying attention only to the content of the responses and interpretating. When you get a statement you say, well, that means.

Q. You were present when Dr. Hutt testified about the Rorschach test yesterday?

A. Not all morning, no. I heard some reference to Card 1 later on in the afternoon. I wasn't present during the presentation of his entire protocol, which I understand he went through every card and every response.

Q. Did you administer the Rorschach test to David Burks?

A. Yes.

Q. Tell us about it, please, and what role it played in your conclusion?

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[493] When I calculated David's Rorschach it was entirely within normal limits for psychosis. That is his "F" plus percentage is seventy-eight. Normal is seventy-nine plus or minus ten.

A schizophrenic is under sixty. His ability to take these blots and make good form out of them to test his reality of this and make good things out of them is normal.

That does not mean he doesn't have problems. He does have problems. But the problems are not psychotic.

He is not psychotic in perception, in orientation of his thoughts, he is not psychotic in his attitude or his thoughts, his attitude about life, and there is really no basis on this data or the scoring system of the other Rorschach protocol that I understand you have to consider that a psychotic one. It is consistent with a character disorder. It is consistent.

For instance, on this Card 1 which is one thing I did hear yesterday, comments were made about these little things up here, these feelers, pinchers. He called them pinchers.

If you look, they are. They are things like that. That is good form level.

What it indicates is anger, it is an angry kind of response when you get pinchers and claws and things like that. That is indicative of anger but it is good form.

There is nothing crazy about it, psychotic.

[494] He took it and integrated it well and said what it looked like and gave his emotional attitude about it.

This is anger. We can go through all of them blow by blow but basically that is what it is. "F" plus is seventy-eight plus percent.

Q. When you say "F" plus, you are talking about David Burks' score?

A. David Burks' score on the Rorschach protocol.

Q. You mentioned the character disorder. Dr. Buchanan, does character disorder cause people to do things they wouldn't do if they were in control of themselves?

A. Well, I am not sure what one means by control of himself.

Q. Does it ever cause them to do things they aren't responsible for?

A. No. They are quite aware of right and wrong. They are quite aware of their actions. Basically they just don't care.

Q. On the WAIS test, that is where the question is how are a fly and tree alike, please look at it and tell us how David answered that question when he came to your office.

A. That is probably on the similarity test. I don't think we—yes, we did. He told me that they were both alive, which is a perfectly good answer and he scored two.

Q. He didn't tell you that you fly a kite and it gets [495] caught in a tree?

Doctor, do transient psychotic episodes cause confusion?

A. Yes.

Q. Did David Burks exhibit any confusion when he explained the events of October 23rd to you?

A. Of course I wasn't there. I can only report what he told me and that is he had excellent memory for his activities during that time, he was perfectly aware of his actions, described how he went to the trunk of his car, described going to Memphis and returning.

That to me is inconsistent with a transient psychotic episode. A transient psychotic episode hits you like a ton of

bricks and you become confused and bewildered and do crazy things. It is also kind of foggy afterwards. You have sort of a vagueness of it.

Q. It wasn't foggy for David when he told you?

A. Not from his report to me.

Q. He didn't tell you it hit him like a ton of bricks, did he?

A. No.

Q. Can you distinguish between the concept of lack of conscience on one hand and insanity on the other hand for the jury?

A. Yes. To me insanity is equivalent to psychosis in [496] my mind and insanity or psychosis, as I prefer to use it, which is a more psychological term, psychosis implies a lack of reality testing and inability to be aware what the real world is and a thought disorder, that is a strange attitude, strange belief about things about them.

Thought disorders are hallucinations and delusions. Thought disorders could be—well, they are basically delusions and hallucinations.

Lack of conscience is really a lack of remorse or lack of guilt. I believe Dr. Tucker described it in terms of superego. It is really the same concept. It is a notion that a person has within them a certain guilt system that they have learned through their upbringing and this conscience guides them in their actions.

They weigh the consciousness of their actions and their conscience brings out the negative aspects that our society believes in and it becomes then a check, stopgap.

Q. Doctor, if David made an elaborate plan for the bank robbery, drew out a route on the map, made preparations, wouldn't you say he was weighing the consequences?

A. It would be an assumption. I can't say. He went through a complicated act that would probably preclude confusion. Whether he actually weighed the consequences or not, I don't know.

I would not know. I would doubt that he paid much attention to them but he may have gone through and said, if I do act "A" the consequences will be this but I don't care.

Q. Thank you. You mentioned the word delusions and hallucinations. Did you ever ask David if he ever had either one?

A. Yes.

Q. What did he say?

A. He said no.

Q. Doctor, did you give David any tests that you just didn't tell us about and didn't think was important and so you didn't include them in your report?

A. No.

Q. Do you ever give a patient tests that you don't think are important?

A. No. It is a waste of his time and mine.

Q. I believe there are four remaining tests that you administered to David. What role briefly did each of them play in your conclusion?

A. As far as diagnosing, the essential tests are the Rorschach and MMPI. Beyond that, I will make one other exception on that. I gave him what is called the Proverbs Test. I will give you an example here. A number of questions, I asked him to define them. For instance, I asked him to tell me what it means when I say where there is a will there is a way. What does that proverb mean?

[498] Psychotics have difficulty with this kind of thinking, the ability to abstract. They are very concrete.

A psychotic person gives you very concrete answers. If you say a rolling stone will gather no moss they will say it is going so quickly. It takes moss a long time to grow.

People that live in glass houses shouldn't throw stones. Well, you might get hit by it, get hurt. It is very abstract.

His proverb was a plus twelve, which is excellent. Out of the twelve proverbs he did not give one concrete answer. Everyone was abstract to some level.

There is a different degree of goodness of abstract, but none of them were negatively answered. So those three, this is really to rule out—one more check. Of course when you start the testing you don't know what the results are going to be. If I had that and the Rorschach, I wouldn't have done this.

When you are administering your tests, you haven't scored it, you don't know what the results are going to be entirely.

The other tests are more for dynamics. Given the definition diagnosis, what is going on to cause it and that is what the other ones are for. Does that answer the question?

Q. Yes, sir. The defense attorney will cross examine you now, sir. Please leave your MMPI scale up there. When [499] you leave the witness stand, take it with you.

CROSS EXAMINATION OF DENTON BUCHANAN

BY MR. DURHAM:

Q. Good afternoon, Doctor.

Dr. Buchanan, you were here and heard the testimony of Dr. Hutt that teaches at the medical school in Memphis?

A. I heard part of it.

Q. He is a psychologist, is that correct?

A. Yes.

Q. Wouldn't you agree you heard him state he was a former staff member at Menninger University?

A. No, I didn't hear him say that.

Q. Assuming that, wouldn't you agree that Menninger is the Rolls Royce or Cadillac of the mental health schools in this country or maybe in the world?

A. A very good friend of mine left Menninger to take up a VA position because Menninger is going downhill so fast.

Q. Isn't Menninger the most renowned and respected mental health center in the world?

A. It certainly has a reputation that is good. I have not been there. From what I understand its existence in the last five years has not meant what it was in the late forties and early fifties. Its reputation comes from the late forties and fifties.

[500] Q. Would you disagree with the statement Dr. Hutt made that lots of people think the MMPI test you have up there is not valid?

A. I would disagree with that.

Q. Now, your MMPI shows David was truthful on it with you, is that correct?

A. Yes.

Q. Was this a computer graded MMPI?

A. No, it was not.

Q. Now, do you attach any significance to the fact that the doll, the fact David never revealed to either you or anyone else the existence of the doll as far as David's pathology is concerned?

A. I am sorry. Say it again.

Q. My question is, as far as David's illness is concerned, what significance do you attach to the fact that here is a man coming in to be examined hoping to be found to be—motivated, obviously, to be found incompetent, who never bring

up the fact that he has a doll and that he has an unusual attachment to this doll?

MR. WINDSOR: Objection, Your Honor. Counsel has forgotten to preface his question with assuming that the man had a doll.

Q. Let's assume further that he has an extremely unusual attachment to this doll that represents, as Dr. Tucker said, [501] a transcendental object, a small baby would have a doll to transfer relations from his mother to the doll to the adult and that second step, in between step, is the doll.

David hasn't gotten to the third step. Let's assume that. He is right at the second step away from his mother but not yet an adult.

My question is, assuming that, wouldn't you think—what significance as far as his problems are concerned would you attach to the fact he never, if you assume this, never told Dr. Tucker, Dr. Hutt, Dr. Munden, Dr. Buchanan or Dr. Farrer about this doll?

A. I guess he did tell Dr. Tucker or somebody.

Q. Assuming his mother told that.

A. Well, okay. There are several parts to the question, and I will get at some of them. First of all, I am not sure he came in to me motivated to be proved incompetent. He came in to me and told me that he fully expected to plead guilty to a charge of—I think he said three to five and eighteen months with good behavior, is what he served. I am not sure he expected to come in to me to be proved incompetent so he would have an impetus to bring up the doll to be crazy. As far as Dr. Tucker's interpretation of the existence of the doll, that is very good psychoanalytic theory and interpretation. I can only bring up one other example that I have experienced, a very similar situation of a patient who had a character [502] disorder, inadequate personality was his definition.

He, too, had a doll. His doll was designed to arouse reactions in people and he would use it to be defiant towards people, pull up his doll to get a reaction and response.

As soon as we said, okay, Johnnie, you like that doll, we want you to carry that doll with you all the time, he lost all interest in that doll and never would carry it after that.

I think the psychoanalytic interpretation of the doll for Johnnie is not accurate. I think it had other meaning to him.

Whether or not that is applicable to David, I don't know, and I don't think anybody does.

Q. You mentioned that David was not psychotic and I believe you defined it. What was your definition of that again?

A. Psychotic is a lack of reality testing or thought disorder.

Q. Is it correct if I say you failed to perceive reality?

A. Yes.

Q. Normally we will all agree that David does perceive reality, in fact with a high IQ. Wouldn't you say from your testing that David has a terrific insight about everyone except perhaps himself?

A. I think he does see the world essentially the way we do. I don't think his emotional attitude about the world is [503] quite the same as ours but I think his perception to use your word—

Q. We equated essentially the perception with psychosis—

MR. WINDSOR: Objection.

THE COURT: I think he equated the lack of perception. Isn't that what you meant?

MR. DURHAM: Yes.

Q. What I am leading up to is, shouldn't we be more concerned with David's ability to control his behavior rather than what everyone admits, that is that David is not psychotic?

A. Does everybody admit that now?

Q. My question is, what about David's ability to control his behavior?

Let's get away from psychosis. We all admit David is not psychotic.

Will you tell us about David's ability to control his behavior? How about his controls?

A. His controls are primarily related to the kind of this harboring resentment that seethes away underneath him and provokes him to act out in asocial or antisocial manner.

I don't know what triggers him at any particular moment to act it out. I am confident that he is aware of his acting out and aware of what society thinks of his behavior but basically he just doesn't care at that particular time.

Q. It would be correct to say, would it not, that David's

[503b] pathology is this rage builds up within him from whatever cause—there are different opinions on that—and this rage builds up in David and it gets to the point where he rids himself of this rage in an aggressive, antisocial manner?

Would you agree with that, Doctor?

A. I don't know of any physical aggression directed towards other people. It is an aggression towards society, if that is what you mean.

Q. That's correct.

A. Yes.

Q. That means a lack of control, does it not?

A. I think it means a disregard of the controls.

Q. I have a quote here from Mr. Windsor's examination and correct me if I am incorrect.

You said basically they just don't care. Is that right?

A. I think so.

Q. You were speaking of behavior of the type of person you found David to be? Doesn't that mean a person who just doesn't care, has a lack of ability to conform his behavior to what is expected of him?

A. No. I think if he should decide to, he would. I think he goes—just doesn't decide to do it.

Q. You said if you decided to. I don't mean to argue. You said if a man doesn't care, doesn't it follow that he cannot [504] he does not have any control?

A. No. That doesn't follow in my mind. I understand the point you are making but I think the distinction is when you say he doesn't have the control, it sort of removes it from his brain. I think it is quite there.

I think the control is there. He just doesn't use it. When you say a person doesn't have control, you are saying that it doesn't exist and I think it does exist but he doesn't use it.

That is, I think he is quite aware of society's standards which he abides by most of the time but once in a while he takes his own way of showing a defiant act.

Q. Can you explain to me how that wouldn't be a distinction without a difference to say one has controls but doesn't use it or can't use it?

A. I don't know if there is a lot of difference between that.

Q. I have another quote here. You said there were no

transient—no evidence of transient psychotic episodes on David's robbing the bank.

A. I found on my testing no evidence of remnants of prior psychotic—

Q. That is really unrelated to the issue, if we assume the issue to be whether or not David could conform his conduct to the requirements of law, would it not be, because one doesn't [505] have to have a psychotic episode to be unable to conform one's conduct to the requirements of the law?

Do you understand my question?

A. One doesn't have to have a psychotic episode to not conform?

Q. To conform your conduct to what the law requires.

THE COURT: I think you better state that over. You got it backwards, Mr. Durham. You mean to be unable to conform is what you are saying?

MR. DURHAM: Yes, sir.

THE COURT: But you reversed it.

Q. To be unable to. It is not necessary to be psychotic to be unable to conform to the law, is it?

A. To be unable? It depends on what you mean by unable. In David's case he has the notions of right and wrong, he decides not to use them. If that is unable to control it then I agree. If that is an operational definition of unable, I would agree.

Q. Would you go further than the right and wrong? We agree David knows the difference between right and wrong and say that because he has no controls that he would not be able to conform to the law?

A. I am not sure I said he has no control. I said he doesn't use them.

Q. I see. Okay.

[506] Now, I have another quote here. You said David made an elaborate plan in the history you took, he gave you the details, and so forth and you concluded he made an elaborate plan.

Doctor, isn't it consistent with a personality where this disorder builds up in an individual at such a rage that they lose control and wouldn't it be consistent with a person when they lose control they wouldn't necessarily fly off the handle but they could lose control in a way that would be methodical?

A. I never said he had an elaborate plan. As a matter of fact, I think the description to me was that it was rather not well planned out.

Q. I am sorry. I wrote down this and it could be wrong.

A. I don't think I—I may stand to be corrected.

Q. Suppose the prosecutor attempted to show and the truth showed hypothetically that he thought it out, got a getaway car and had done this and that, what fairly could be determined as an elaborate plan. That wouldn't be inconsistent with the fact that a man is not able to conform his conduct to the rules of society, would it?

A. No. That would not be inconsistent.

Q. Really in a sense, and I don't want to trap you on this, in a sense it would be irrelevant whether or not his plan was elaborate or on the spur of the moment with respect [507] to whether or not he could conform his conduct to the rules of society?

A. No, I don't agree. You see if—we are still on this hypothetical—if we are assuming that the motivation was an angry acting out then the plan by which that act would take place would have as much meaning as the act and, in other words, there would be some pleasure in planning it such that when the consequences occurred it would serve the purpose and that was to sort of get even or act in a defiant way.

Q. You are saying it is all part of the same thing, the planning and execution of it are all part of the pathology?

A. All part of the character disorder, yes.

Q. All right. We are agreeing, are we not, that David's personality is such that these tensions build up within him until they finally reach such a rage that he act them out in an antisocial manner?

A. Essentially, although that statement implies there is sort of a gradual build up to a threshold and bang it goes. I am not sure it really works that way. I don't know.

Q. I would be interested to know your opinion on that. Do you think it is gradual?

What would be your opinion, if you have one?

A. I don't know. I have seen people that meet that. That is something that would not come out of psychological tests but more of a long-term experience with the individual [508] and you would have to kind of know the way he reacts to little frustrations and how much he tolerates them and

harbors a grudge. It wouldn't be inconsistent with his tests profile and protocol but whether it is immediately applicable to David I don't know if anybody can answer that. At least I can't.

Q. Have you read Dr. Farrer's report?

A. No, sir.

Q. In that report, and I will ask if you agree with it, he states in both bank robberies—you are aware he robbed a bank four, five years ago, is that correct?

A. Yes. I am not sure of all the details but I am aware of it.

Q. I think in October, a little over four years ago.

Dr. Farrer states in both cases it is his professional opinion that David had a desire to be caught. My question is, do you concur in that opinion and, if so, why?

A. Yes, that is my impression. I can't deal with the first one. If I can deal with the second bank robbery.

Q. Yes.

A. That is my impression from the projected material he gave me. It was very clear that he is harboring a resentment towards his family, primarily he is tired, was his word, compromising himself to his parents all the time, and this anger built up to a point where he robbed it in order to get caught, that that would be a way of being defiant towards [509] his parents.

Q. David told you affirmatively I believe you testified he had had no hallucinations in his background?

A. That is what he told me, yes.

Q. I would like to ask you a hypothetical question. Assuming that a government witness testified about David telling him of, to say the least, quasi hallucination episodes.

MR. WINDSOR: I will object to that because that builds an answer right into the question.

THE COURT: Assume that a government witness said that David told him he had a dream about so and so and then go ahead. That is what he actually testified.

MR. WINDSOR: I object to that word dream.

THE COURT: Well, that is what the man said.

Counsel tried to get him to say delusions but he didn't say that. He told him that, he had that thought in his mind.

Go ahead.

Q. Assume that before the bank robbery a friend of

David's, his employer stated that David had told him on one occasion that he had a dream where everybody was sitting around in a room and they were—no, one person was in the room and there were lots of cameras on this person and I am not sure if I remember the rest of it, Your Honor, and I don't want to misstate it, something about——

[510] MR. WINDSOR: I would like to say that my impression of it was that it was a daydream, not a night dream.

MR. DURHAM: Go ahead.

MR. WINDSOR: It was in response to a question, is there anything you would like to do, David? He answered, there is something I always wanted to do. I think I would like to do this. I would like a motion picture, I would like to sit a person in a room and put cameras around him from all different angles and record photographically the person having his brains blown out with a gun.

Q. Okay. Assume that. I am not sure that is agreed.

Let's assume that is a hypothetical. The jury will remember exactly.

Let's assume hypothetically David had that dream and related that to someone and then you ask him, David, have you ever had any hallucinations or dreams, or just hallucinations?

A. I didn't inquire about dreams. I inquired about hallucinations, does your mind play tricks or do you see things or anything that other people don't see?

Q. David had not related this incident that Mr. Windsor just related and tie that in with the fact he said nothing about the doll, what affect would that have on his pathology?

A. This is a hypothetical daydream? What do you mean by that, that there is a semi-conscious state?

[511] Q. It wasn't explained in the testimony.

A. Well, I think it is fairly important. It is clearly not a night dream then? Is that within the hypothetical? The literature, the research literature on what I mean by daydreams, that is a semi-conscious state, sort of twilight zone before you go to bed and wake up, sitting around and kind of semi-fantasizing, that amount of aggression and amount of what one might interpret as pathology is much less than occurs in night dreams. That is night dreams are more likely to be associated with real life than the fantasies in the twilight zone, daydreaming. There is some very interesting

research showing all sorts of ethnic differences and differences related to alcoholic consumption and how that influences the daydream.

Basically what it boils down to—and I don't call myself an expert on daydream literature—what it boils down to in my impression is it is a way of fantasizing but has very little relation to overt behavioral reactions. Nobody has been able to correlate daylight fantasies-twilight daydreams or whatever you want to call that state with any kind of pathology.

People have done research with normal college students and prisoners that I am aware of and the frequency percentage of abnormal—loosely defined—whatever it means—normal content of daydreams is really no different.

Q. The answer I was seeking, the direction of the answer [512] I wanted the significance of David not relating that to you.

A. The fact he didn't relate it to me? He didn't think it was very important.

Q. Wouldn't this be true, the fact that David didn't relate the dream to you, and the doll and the fact he should, he is telling the truth on the MMPI, means that he was dealing with you in a straightforward manner as far as you can determine?

A. That was my impression when I was with him, yes, that he was straightforward, and honest. As I say, he told me that he fully expected to plead guilty to his crime. I saw in my clinical across the table judgment with him no reason to think he was pulling my leg.

Q. Did you maintain an air of benevolent skepticism in your professional relations with patients who are sent by the court for crimes?

A. Yes.

Q. Your evaluation occurred after Dr. Farrer's, did it not, between Dr. Farrer's first and last evaluation?

A. I really don't know. That could be.

Q. Let me ask you, we have stipulated that in the WAIS test which is Exhibit 1, and I will ask the Clerk to hand you Exhibit 1, in the WAIS test you left out the comprehensive arithmetic, vocabulary, the digit symbols, picture completion and object assembly.

[513] A. Yes.

Q. Now, look at Exhibit 1 under information, Number 14 which is one of the parts you left out, I believe. Is that correct?

A. Say that again. Information, Number 14?

Q. Yes.

A. I did not leave that out, no.

Q. That is one of the parts your examiner took rather than you?

A. That's correct.

Q. Isn't it true—what did she write down in your test? Tell the jury what the question is.

A. The question is when is Washington's birthday?

Q. And your examiner wrote down the date?

A. February 22nd.

Q. The correct date?

A. Yes.

Q. You will notice that when Dr. Hutt took these tests personally, notice under Washington's—did you hear the testimony about that?

A. No, sir.

Q. Assume that Dr. Hutt testified that the examiner said that David said you are talking about George Washington, and he went on and gave some reasons about people of fifty years old when they are born—

[514] THE COURT: Now, he didn't say that. Nobody is fifty years old when they are born. We haven't gotten to that yet.

THE WITNESS: Let's hope not.

THE COURT: What he said in his answer, he went into the year he probably was born about 1736—26 I believe it was because people by the time they were fifty, they should have achieved something and he was president in 1776, he was born in August because most people were conceived in the Winter months. I believe that is it.

Q. That is it, and assuming he went into that, and look at David's other answers on that information sheet about the presidents, where he said Dwight D. Eisenhower, Lyndon Baines Johnson and Richard M. Nixon. I notice in your report that you read to Mr. Windsor that you have no mention of grandiosity in David's makeup.

My question is to you, wouldn't it have been better if you had given these tests and wouldn't you have picked up

some more pathology with respect to David's condition, namely the characterization of grandiosity?

A. I would not pick that up from a WAIS, no. I don't have much faith in the intelligence test being a projected test.

Q. Have you heard every other doctor? Assume hypothetically that every other doctor that tested him has [515] emphasized David's grandiosity.

Do you disagree with that?

A. Do I disagree with that?

Q. Yes.

A. No, I don't. He does have a quality by which he tries to build himself up mainly because I think in his perception he has been continually knocked down.

Q. Many of your tests were made by this young lady seated out there rather than yourself as opposed to Dr. Hutt who made the tests personally, is that correct?

MR. WINDSOR: Objection. He can't answer that.

THE COURT: He doesn't know about Dr. Hutt.

Q. I will just ask the first part of the question.

A. Mrs. Bell conducted it.

Q. Dr. Buchanan, do you think that in October when he committed this bank robbery that he was capable or even substantially capable of obeying the law when this rage build up in him for whatever reason, his parental or job situation?

A. Was he capable of obeying the law?

Q. I don't want to ask you about whether he knew it was right or wrong or had an irresistible impulse.

MR. WINDSOR: Counsel isn't asking a question. He is making a speech.

THE COURT: Well, it is a combination. Go ahead.

Q. I want to ask you——

[516] THE COURT: Why don't you go ahead and ask him instead of wanting to ask him.

Q. Do you think David on that day could substantially conform his conduct to the rules of society?

A. Judging from his behavior and from what I understand of the case, he did very clearly obey the law in almost everything except in robbing the bank. As I understand it

he purposefully drove up Novensville Road and obeyed all the traffic laws and made no criminal, crazy acts until he for whatever reason decided, I am going over there and rob that bank and then did that.

So, by behavior, I have to say he was capable of obeying at least some laws but clearly by behavior did not obey another law. I don't mean to evade the issue. I am trying to define it. I think that is it.

Q. So, the bank robbery was the exception?

A. Yes, as far as I understand it. I am not sure I know personally all of the events that went on.

THE COURT: That is the only law you know he broke, is what you are saying?

THE WITNESS: That is true.

MR. DURHAM: Well, thank you.

[517] REDIRECT EXAMINATION OF DENTON BUCHANAN

BY MR. WINDSOR:

Q. Doctor, there is one thing I want to get straight and one other question I want to ask you, please.

Counsel, defense counsel asked you a question I didn't really understand and I want you to clarify one thing about it.

He combined the dream he alleged with your MMPI score. The two aren't related at all? The MMPI doesn't have anything to do with dreams, does it?

A. No. I missed that connection.

Q. I want to give you a hypothetical question. You said that David just didn't care when he robbed the bank.

Now, on that day, and this is the hypothetical, if he kidnapped a taxi driver and took him out and tied him up and left him out in the ditch and said, I am not going to hurt you if you do what I say, and before he left, don't worry, if somebody hasn't found you by this afternoon I will call and tell them where you are; he went ahead and robbed the bank and the police caught him and on the way back to the police station he said, hey, do you know there is a guy tied up out there and I want you to check on him; what would that mean? Does that mean he doesn't care?

MR. DURHAM: I object to the leading question.

THE COURT: Go ahead.

[518] A. It is pretty complicated and a purposeful act. It doesn't sound like he was terribly confused to me. It suggests that probably that action of tying up a cab driver and leaving him in the back seat of the car——

Q. Leaving him in a ditch.

A. Leaving him in a ditch was probably a momentary-aggressive act, assaultive act that didn't suit his needs and so——

THE COURT: I don't think he understood the situation. Why don't you tell him.

Q. All right, sir. Let me enlarge on the hypothetical a little bit. I am sure you missed my attempt to convey it to you.

Wonder if David planned to do that in order to procure a taxicab to take on the bank robbery and he bought adhesive tape and looked and found a deserted area and drew it on the map and decided this would be a good place to leave the cab driver and placed a telephone call and said, send me a cab, and he came and he said he wanted to go to his girlfriend's house, he got the luggage and told him to turn here, turn here, turn here and got in an unpopulated area; David said, I don't know why my girlfriend lives way out here, there aren't many houses out here; and when he got where he wanted to be he stopped the cab driver and put a gun to his head and said, I won't hurt you if you do what I say.

[519] MR. MOON: Could we shorten this hypothetical?

THE COURT: No, sir. Go ahead. It is all right.

Q. I don't want your money, I want to use your taxicab for a while. I am going to come out and around and take you away from the car and he did it, used the tape, tied the man's hands behind his back after he had asked the man to tie his feet, decided his feet weren't tied well enough to suit him and came around and before he did that said, don't kick me and then he said don't worry, I will leave you here but if somebody hasn't found you, I will call later and tell them where you are and they can come and get you; and he robbed the bank, was trying to escape and was caught by the police and was being taken back in the police car; he said, say, you know there is a guy tied up out in the ditch, I want somebody to get him.

Does that mean David could care if he wanted to?

A. Yes. Well, care in varying degrees. If he was a really wonderful individual he wouldn't have gone through all that. But he cared enough not to——

THE COURT: Would that shed any light on whether or not he could have conformed his conduct to the precepts of the law on that day?

THE WITNESS: He used that particular type, I guess, of breaking the law in order to meet what he had determined as his need. For some reason he decided that [520] robbing the bank was his way of getting even with his parents. Tying up the cab driver, that was a means to his ends. He did not want to use that means to inflict any more harm. That I guess is caring to an extent. I can't honestly say that the man has great empathy or he wouldn't have tied somebody up and threw him in.

Q. He didn't throw him in. He left him there.

A. I am sorry. I apologize.

MR. WINDSOR: Thank you, Doctor.

MR. DURHAM: I have nothing further.

THE COURT: Thank you, sir.

Call your next witness.

MR. WINDSOR: There will be no more witnesses. That is the government's proof.

* * * * *

[522] THE COURT: I know you are not an appointed counsel. Let me suggest that you move for a judgment of acquittal at the conclusion of all the proof and that is a safe way to protect your client completely from any problems, and I will deny it, but you have it at least on the record.

Let me make a suggestion that you do that.

MR. MOON: Yes, sir. We have considered that and for the record we will move for a directed verdict of acquittal.

THE COURT: Let the record show it is denied.

All right.

* * * * *

[574] THE COURT: Ladies and Gentlemen of the Jury, you have heard the evidence in this case and the arguments which have been made by the attorneys.

It now becomes my duty to instruct you as to the law by which you will be guided in arriving at your verdict.

Now, first you will have the indictment in the jury room with you. I am not going to read it to you. I will point out

that it consists of two counts but one has been dismissed. So, you can ignore that.

It is just the first count. The first count charges that on October 23, of last year in this District the defendant by force and violence and intimidation took from the person and presence of employees money belonging to and in the care, custody, control, management and possession of the Commerce Union Bank, Nolensville Road Branch, Nashville, Tennessee, the deposits of which were insured by the FDIC; and that in committing this offense the defendant did assault the employees of the Commerce Union Bank and did put in jeopardy the lives of said employees by the use of a dangerous weapon.

This indictment is grounded on a statute of the United States which provides in pertinent part that whoever by force and violence or by intimidation takes or attempts to take from the person or presence of another any property or money or any other thing of value belonging to or in the care, [575] custody, control, management or possession of any bank shall be guilty of an offense against the United States, and provides further that whoever in committing or attempting to commit any offense that I just described assaults any person or puts in jeopardy the life of any said person by the use of a dangerous weapon or device shall be punished as provided by law.

The term bank in this means any bank that deposits of which are insured by the Federal Deposit Insurance Corporation.

The essential elements which the government must prove in connection with this charge is first the act or acts of taking from the person or presence of another money belonging to or in the care, custody, control, management or possession of a bank as charged.

Second, the act or acts of taking such money by force or violence or by means of intimidation. Third, the act or acts of assaulting or putting in jeopardy the life of any person by the use of a dangerous weapon or device while engaged in stealing such money from the bank as charged and, fourth, doing such act or acts willfully.

Now, as I stated to you when you were being empanelled, the burden is always on the government to prove beyond a reasonable doubt every essential element of the crime charged.

[576] The law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

Now, to take or attempt to take by intimidation means willfully to take or attempt to take by putting in fear of bodily harm. Such fear must arise from the willful conduct of the defendant rather than some timidity of a victim.

However, the fear of the victim need not be so great as to result in either terror, panic or hysteria. Taking or attempted taking by intimidation must be established by proof of one or more acts or statements of the defendant which are done or made in such a manner or such circumstances as would produce in the ordinary person fear of bodily harm.

Now, actual fear need not be proved. Fear may be inferred from statements made or acts done or omitted by the defendant or statements made by the persons involved therein.

Now, if the jury should find beyond a reasonable doubt from the evidence in the case that the defendant did willfully commit robbery of the bank as charged then the jury must proceed to determine whether the evidence in the case establishes that the defendant in committing the robbery assaulted or put in jeopardy the life of any employee as charged in the indictment.

[577] Any willful agreement or threat to inflict injury upon the person of another when coupled with an apparent present ability to do so or any intentional display of force such as would give the victim reason to fear or expect bodily harm constitutes an assault.

An assault may be committed without actually touching or striking or doing bodily harm to the person of another.

So, a person who has the apparent present ability to inflict bodily harm or injury upon another person and willfully attempts or even threatens to inflict bodily harm as by intentionally flourishing or pointing a pistol or gun at another person may be found to have assaulted such person.

Now, a dangerous weapon or device as stated in the statute includes anything which could be readily operated, manipulated or used by another person to inflict bodily harm and, of course, it includes a gun

To put in jeopardy the life of another person by the use of a dangerous weapon or device means to expose such

person to the risk of death or fear of death by the use of such a dangerous weapon or device.

Now, in connection with the charge that I have just given you as to the essential elements, I said that the act must be done willfully, and there we come to the crux of the case involved herein because the defendant has entered a [578] plea of not guilty by reason of insanity.

Now, under the defendant's plea of not guilty there is an issue as to his sanity at the time of the alleged offense.

The law does not hold a person criminally accountable for his conduct while insane since an insane person is not capable of forming the intent essential to the commission of a crime.

The sanity of the defendant at the time of the commission of the alleged offense is an element in the crime charged and must be established by the government beyond a reasonable doubt just as it must establish every other element of the offense charged.

A defendant is insane within the meaning of these instructions if at the time of the alleged criminal conduct, as a result of mental disease or defect, he lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law.

As used in these instructions the terms mental disease or defect do not include an abnormality manifested by repeated criminal or otherwise antisocial conduct.

For the purpose of throwing light on the mental condition of an accused at the time of the alleged offense the jury may consider evidence of his mental state both before and after that time.

[579] The material issue, however, is whether the defendant was sane or insane at the time of the alleged criminal conduct.

Temporary insanity as well as insanity of longer duration is recognized by law. If the evidence in the case leaves you with a reasonable doubt as to whether or not the defendant was sane at the time of the alleged offense, you will find him not guilty even though it may appear that he was sane at earlier and later times.

In considering the mental state of the accused the jury will also bear in mind that the law never imposes upon the

defendant in a criminal case to either call witnesses or produce any evidence.

Now, even where the defendant has raised an issue of insanity and the jury finds from the evidence in the case beyond a reasonable doubt that the defendant was not insane at the time of the alleged offense, it is still the duty of the jury to consider all the evidence in the case which may aid determination of the state of mind including all the evidence offered on the issue of insanity in order to determine whether the defendant acted or failed to act with specific intent as charged.

If the evidence in the case leaves the jury with a reasonable doubt whether the mind of the accused was capable of forming or did form specific intent to commit the crime charged, the jury should acquit the defendant.

Now, the credibility of the witnesses and the weight of their testimony are matters which are entrusted exclusively to the jury for determination. In considering the weight that you will give to the testimony of the several witnesses, you should take into consideration their interest in the result of the trial, if any such interest be shown; their fairness or bias, if any such appear; the reasonableness or unreasonableness of the testimony given by them; their opportunity for seeing and knowing and for remembering the things about which they have testified and all of the facts and circumstances proved tending to either corroborate or contradict the witness, if any such appear.

You will consider all the evidence in the case whether it is direct or circumstantial. Circumstantial evidence is simply evidence of facts from which the jury may conclude that the facts sought to be proved actually exist.

Now, I think I said this earlier in the trial. Ordinarily the law does not permit witnesses to express opinions. But there is an exception to this in the so called expert witness rule. So any person who has by virtue of education, training or experience demonstrated a competence in some field may express his opinion in connection with that field.

In this case you have heard the testimony of [581] five witnesses who have been denominated as expert witnesses.

It is your duty to review the testimony of those witnesses, consider it, consider the background of the witnesses who have testified and then give it such weight as you think it deserves.

Now, all the evidence in the case must pass one test. It must satisfy you of the guilt of the defendant beyond a reasonable doubt under these instructions before you bring in a verdict of guilty. If you have a reasonable doubt as to any of the elements of the offense, including insanity of the defendant at the time of the commission of the offense, then you have a reasonable doubt that must compel you to bring in a verdict of not guilty.

Reasonable doubt means just what the term itself implies, a doubt which has reason for its basis. It doesn't mean that there is a mere possibility that the defendant may be innocent. It doesn't mean in this particular case a mere possibility that the defendant may be insane within the definition of the term as I have given it to you. It means a doubt which is founded on reason, which can be rationally explained.

Now, if after you consider the evidence in this case and you have an abiding conviction that the defendant is guilty under the charge as I have given it to you and you are fully satisfied with the truth of the charge, then you are [582] satisfied beyond a reasonable doubt.

If, on the other hand, after you have impartially considered the evidence you have a feeling that you are not satisfied as to any element of the offense, that the government has not carried its burden of proving the defendant guilty beyond a reasonable doubt in connection with any element, then you have a reasonable doubt and you should bring in a verdict of not guilty.

Now, this case must be decided, as must all cases, by you without regard to your personal sympathy and without any prejudice.

The law expects you to weigh the evidence in the case and then decide whether under this charge the defendant is or is not guilty and so report.

With the punishment of the defendant, you have nothing whatsoever to do in the event he is found guilty. Therefore, it would be improper for you to take into consideration what punishment, if any, he might receive if he were found guilty.

On the other hand, you have no right to speculate as to what would occur if you found him not guilty. You have no right to speculate on that, because you shouldn't find him not guilty if you think he is guilty under these terms.

Neither should you find him guilty if you think he is not guilty under these terms.

[583] The point I am making is it is not up to you to consider or think what would happen to him in event you found him guilty or not guilty. That is not your function.

You have a simple task. I am not saying it is an easy task, but it is a simple task and that is merely to weigh the evidence that you have heard, consider the instructions in the charge as I have given it to you and then determine whether or not under that evidence and under this charge the defendant is or is not guilty.

Let me caution you about one thing. During the course of the trial and in this charge, I have made statements to you. During the course of the trial I have asked questions of witnesses, I have made comments. You should not construe any statement that I made during the trial or any statement in this charge as an indication of my own opinion as to what verdict you should render, because you are the sole judges of the facts and your verdict must respond to your own conscientious consideration of the evidence.

Now, with the charge as I have given it to you, you are to retire and consider your verdict. It will be your duty to go back into the jury room, select one of your number to serve as presiding officer and then continue with your deliberations until you have arrived at a unanimous decision.

You must mentally investigate the evidence you have heard, recollect it, consider it in connection with the [584] charge in the indictment, which you will have with you, consider it in connection with the charge as to the law which I have given you here now and then try to arrive at a unanimous decision.

I have never asked any juror to agree just for the purpose of agreement, for the sake of agreement. I do ask if you find yourselves in any initial disagreement that you be very tolerant of other people's opinions, very careful in the examination that you make for the reasons they state they may have for those opinions, very careful also in the examination you make for the reason you have for your own opinion.

Do all that and see if you can arrive at a unanimous decision in this case.

Okay. If you will step just outside the door for a moment, I will call you back in just a minute.

You need not sit down. You won't be out that long.
(Whereupon, the jury left the courtroom.)

THE COURT: Does the government have any objection to the charge?

MR. WINDSOR: No objection, may it please the Court.

THE COURT: Does the defendant have any objection?

MR. DURHAM: I have a supplement to it, Your Honor.

[585] THE COURT: All right. Let me see it.

MR. DURHAM: Your Honor may have intended to do this anyway.

THE COURT: Well, that is not part of the charge. We will just send them out with them.

MR. DURHAM: Thank you, Your Honor.

THE COURT: He just requested that they have a right to look at the exhibits.

THE CLERK: May I remove the knife and gun, Your Honor?

THE COURT: Yes, the knife and gun don't go out.

MR. DURHAM: May we mark that filed, my request or is it in the oral record?

THE COURT: The oral record is that they are going to get a look at them, which seems to me to be granted.

MR. DURHAM: Yes, sir.

THE COURT: Okay. Let them come back in.

(Whereupon, the jury returned to the courtroom.)

THE COURT: Now, at this time the alternate juror, Mr. Gray, can be excused and the other twelve jurors will retire and consider your verdict.

The Marshal will give you the indictment and he will bring to you all the exhibits with exception of the gun and the knife, which we are not sending out there. All right.

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[587] THE COURT: I have a communication from the jury which indicates they would like to have, I assume read to them again, the portion of the charge with reference to insanity and without objection, I propose to read them exactly what I read them before.

Does anybody have any objection to it?

MR. WINDSOR: No objection from the government.

MR. MOON: No objection.

THE COURT: Let them come in.

Just a minute. I am also going—I have this in mind. These jurors have been here for three hard long days and I have a mind of telling them if they feel they are too [588] tired, mentally too tired to work any longer tonight that I will send them home and let them come back tomorrow and begin again.

Do you have any objection to that?

MR. WINDSOR: No objection.

MR. MOON: I think that is fine.

THE COURT: It might well be a good idea, but I will leave it up to them.

Bring them in.

(Whereupon, the jury returned to the courtroom.)

THE COURT: Now, ladies and gentlemen of the jury, you have indicated you would like to hear again that portion of the charge pertaining to mental illness or insanity. Is that right? All right. Listen to me.

I will read it to you again. Under the defendant's plea of not guilty there is an issue as to his sanity at the time of the alleged offense. The law does not hold a person criminally accountable for his conduct while insane, since an insane person is not capable of forming the intent essential to the commission of the crime.

The sanity of the defendant at the time of the commission of the alleged offense is an element of the crime charged and must be established by the government beyond a reasonable doubt just as it must establish every other element of the offense charged.

[589] The defendant is insane within the meaning of these instructions if at the time of the alleged criminal conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law.

As used in these instructions the terms mental disease or defect do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.

For the purpose of throwing light upon the mental condition of the accused at the time of the alleged offense, the jury may consider evidence of his mental state both before and after that time.

The material issue, however, is whether the defendant was sane or insane at the time of the alleged criminal conduct.

Temporary insanity as well as insanity of longer duration is recognized by the law. If the evidence in the case leaves you with a reasonable doubt as to whether the defendant was sane at the time of the alleged offense, you will find him not guilty even though it may appear that he was sane at earlier and later times.

Now, that is the charge with reference to the issue of insanity. Now, ladies and gentlemen of the jury, let me say this to you.

[590] You have spent three pretty long days here. I don't know how you feel. I don't know if you feel kind of tired and beat up or not but if you do and if you would rather, after a few minutes, recess until tomorrow morning, I will let you go home and come back in the morning and start again.

How do you feel about that? Would you like to keep on tonight or would you rather take a recess and come back in the morning? Have a little conference among yourselves.

A JUROR: We will talk a few minutes.

THE COURT: You all go back and I will call you back in about fifteen minutes and find out—if you haven't brought a verdict by then, I will find out how you feel. All right.

(Whereupon, the jury deliberated and returned a verdict of guilty.)

No. 76-1596

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DAVID WAYNE BURKS,
Defendant-Appellant.

APPEAL from the United States District Court for the Middle District of Tennessee.

Decided and Filed December 30, 1976

Before: WEICK and LIVELY, Circuit Judges; and CECIL, Senior Circuit Judge.

LIVELY, Circuit Judge. This appeal from conviction for armed bank robbery seeks reversal primarily on the ground that the government did not prove beyond a reasonable doubt that Burks was sane at the time he robbed the bank. The government has the burden of proving sanity once a prima facie defense of insanity has been raised. *United States* v. *Smith,* (*Smith II*), 437 F.2d 538, 541 (6th Cir. 1970).

Appellant contends that no witness for the prosecution testified that defendant was substantially capable of conforming his conduct to the requirements of the law he was charged with violating. While they did not agree on the proper diagnosis of appellant's condition, three expert witnesses for the defense testified that Burks suffered from a mental illness at the time of the bank robbery and that he was substantially incapable of conforming his conduct to the requirements of the law against robbing banks. This evidence was directed to the questions identified by this court as critical to the inquiry in *United States* v. *Smith,* (*Smith I*), 404 F.2d 720, 727 (1968), where we wrote:

> The questions for any consideration pertaining to criminal responsibility when defendant offers an insanity defense are as follows:
>
> 1. Was he suffering from a mental illness at the time of the commission of the crime?

2. Was the illness such as to prevent his knowing the wrongfulness of his act?

3. Was the mental illness such as to render him substantially incapable of conforming his conduct to the requirements of the law he is charged with violating?

A negative finding as to the first question or negative findings as to both the second and third questions would require rejection of the insanity defense. An affirmative finding as to the first question, plus an affirmative finding as to either the second or the third question, would require a jury verdict of "not guilty" because of defendant's lack of criminal responsibility.

Even though the only expert evidence in the present case directed to the issues set forth in *Smith I* indicated one conclusion, the jury was not required to accept the expert testimony as conclusive if there was other evidence from which they could reach a contrary determination. However, the fact that the experts disagreed on the precise form of mental illness with which Burks was afflicted did not create a jury issue.

The appellant argues that the jury should not have been permitted to consider either the expert or lay testimony of government witnesses on the insanity issue since it was not directed to the criteria adopted in *Smith I*. The government contends that evidence of the detailed advance planning of the robbery and the behavior of Burks during and immediately after the robbery was relevant to the issue of whether Burks was under such stress as to make him incapable of complying with the laws against robbing banks.

Psychiatrists and psychologists are not limited to answering the three questions set forth in *Smith I, supra;* but may testify broadly as to their contacts with a defendant who relies on an insanity defense, and state their conclusions as to his condition, in medical as well as legal terms. The extent to which lay testimony should be considered on the issue of sanity has been treated in opinions of this court as well as others. *Smith II, supra,* 437 F.2d at 541; *Smith I, supra,* 404 F.2d at 728: *Pollard* v. *United States,* 282 F.2d 450, 460 (6th Cir. 1960); *United States* v. *McGraw,* 515 F.2d

758, 760 (9th Cir. 1975); *Brock* v. *United States,* 387 F.2d 254, 257-58 (10th Cir. 1959). No clear rule emerges from reading these opinions. Therefore, each case is which expert evidence on the question of sanity is sought to be rebutted by lay testimony must be decided on its own facts. *United States* v. *Fratus,* 530 F.2d 644, 648 (5th Cir. 1976).

Though they gave detailed accounts of their contacts with the defendant and opinions concerning his emotional problems, two expert witnesses for the government in the present case did not express definite opinions on the precise questions which this court has identified as critical in cases involving the issue of sanity. The government also presented several eyewitnesses to the robbery, a cab driver from whom Burks took a taxi at gun point immediately prior to the robbery and arresting law enforcement officers. All of these persons, who had very limited opportunity to observe him, testified that Burks did not appear abnormal. Such testimony has been found to have little probative value. *Smith II, supra,* 437 F.2d at 541. Finally, the government called Burks's supervisor in his work as a salesman for three weeks immediately before the robbery. This witness testified that Burks had been able to perform the tasks demanded by his job. However, on cross-examination this witness related an experience in which Burks had told a bizarre story of a room with cameras all around ". . . and blowing somebody's brains out and having a picture of it."

On appeal following conviction the sufficiency of evidence of sanity is tested in the same manner as general claims of insufficiency, that is, by viewing the evidence presented and proper inferences therefrom in the light most favorable to the government. *United States* v. *Shepard,* 538 F.2d 107, 110 (6th Cir. 1976). Even viewed in this light we find no evidence which effectively rebutted the specific testimony of three experts with unchallenged credentials. Thus, the judgment of conviction must be reversed. Since Burks made a motion for a new trial this court has discretion in determining the course to direct on remand. 28 U.S.C. § 2106; *Bryan* v. *United States,* 338 U.S 552 (1950); *Smith II, supra,* 437 F.2d at 541-42; *United States* v. *Wiley,* 547 F.2d 1212, 1216-18 (D.C. Cir. 1975).

We conclude that the interests of justice will best be served in the present case by remanding to the district court for a determination of whether a directed verdict of acquittal should be entered or a new trial ordered. This decision should result from a balancing of the equities by the District Judge. We adopt the standards and procedure outlined by the Fifth Circuit in *United States* v. *Bass*, 490 F.2d 846 (1974), as a guide for the district court on remand:

> [W]e reverse and remand the case to the district court where the defendant will be entitled to a directed verdict of acquittal unless the government presents sufficient additional evidence to carry its burden on the issue of defendant's sanity. As we noted earlier, the question of sufficiency of the evidence to make an issue for the jury on the defense of insanity is a question of law to be decided by the trial judge. • • • If the district court, sitting without the presence of the jury, is satisfied by the government's presentation, it may order a new trial. • • • Even if the government presents additional evidence, the district judge may refuse to order a new trial if he finds from the record that the prosecution had the opportunity fully to develop its case or in fact did so at the first trial. *Id.* at 852-53. (citations omitted).

If there is another trial the district court should not charge that the terms mental defect or mental disease do not include any abnormality manifested only by repeated criminal or otherwise anti-social conduct. *See Smith I, supra,* 404 F.2d at 727, n.8.

Since appellant has conceded in his brief that he did in fact hold up the bank as charged, it is not necessary to reach the other issues presented. His ultimate conviction or acquittal depends solely on a proper resolution of the issue of sanity.

The judgment of the district court is vacated and the cause is remanded for further proceedings consistent with this opinion.

NO. 76-1596

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Filed February 8, 1977, by John P. Hehman, *Clerk.*

ORDER

[Title omitted in printing]

Before: Weick and Lively, Circuit Judges; and Cecil, Senior Circuit Judge.

Upon consideration of the petition for rehearing filed herein by the defendant-appellant, the court concludes that the issues raised therein were fully considered by the court upon submission of the appeal in this case and that rehearing is not required.

The petition for rehearing filed by the defendant-appellant is denied.

ENTERED BY ORDER OF THE COURT

John P. Hehman

Clerk

NO. 76-1596

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Filed February 8, 1977, by John P. Hehman, *Clerk.*

ORDER

[Title omitted in printing]

Before: Weick and Lively, Circuit Judges; and Cecil, Senior Circuit Judge.

The plaintaiff-appellee has filed a petition for rehearing which the court has carefully considered. It is noted that in its petition for rehearing the appellee argues that this court has held that the defendant-appellant must be acquitted. This is not what our opinion held. The court remanded this case to the district court for determination of whether a directed verdict of acquittal should be entered or a new trial ordered.

The petition for rehearing is denied.

ENTERED BY ORDER OF THE COURT

John P. Hehman

Clerk

Supreme Court of the United States

No. 76-6528

David Wayne Burks,
Petitioner,

v.

United States

ON PETITION FOR WRIT OF CERTIORARI TO the United States Court of Appeals for the Sixth Circuit.

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

June 13, 1977

☆ U.S. Government Printing Office: 1977—243-240/42

No. 76-6528

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

DAVID WAYNE BURKS, PETITTONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

DANIEL M. FRIEDMAN,
Acting Solicitor General,
Department of Justice,
Washington, D.C. 20530.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-6528

DAVID WAYNE BURKS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the Double Jeopardy Clause bars retrial in this case because the court of appeals reversed his conviction.

Following a jury trial in the United States District Court for the Middle District of Tennessee, petitioner was convicted of one count of armed bank robbery in violation of 18 U.S.C. 2113(a) and (d). He was sentenced to a term of twenty years' imprisonment. The court of appeals found the government's evidence on the issue of sanity insufficient and reversed and remanded the case "to the district court for a determination of whether a directed verdict of acquittal should be entered or a new trial ordered" (Pet. App. at 970). Petitions for rehearing filed by both petitioner and the United States were denied on February 8, 1977. The petition for a writ of certiorari was not filed until April 11, 1977, and is therefore substantially out of time under Rule 22(2) of the Rules of this Court.

At trial petitioner admitted committing the offense charged against him and relied solely on the defense of insanity. The court of appeals found that the testimony of the government's expert and lay witnesses on the issue of insanity had not effectively rebutted petitioner's prima facie showing through the testimony of his expert witnesses that he was unable to conform his conduct to the requirements of the law he was charged with violating. See United States v. Smith, 404 F.2d 720, 727 (C.A. 6). Relying on its authority under 28 U.S.C. 2106 to "require such further proceedings to be had as may be just under the circumstances,"[1/] and noting that petitioner had moved for a new trial, the court of appeals remanded the case for a hearing to determine whether the government has additional evidence to present on the issue of petitioner's sanity. Following this hearing, the district court is either to direct a verdict of acquittal or to order a new trial (Pet. App. at 970). In so doing, the court of appeals expressly adopted the standards and procedures outlined by the Fifth Circuit in United States v. Bass, 490 F.2d 846, 852-853, as the guide for the district court (Pet. App. at 970):

1/ 28 U.S.C. 2106 states in pertinent part:

> The Supreme Court or any other court of appellate jurisdiction may . . . vacate . . . any judgment . . . brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order or require such further proceedings to be had as may be just under the circumstances.

> [W]e reverse and remand the case to the district court where the defendant will be entitled to a directed verdict of acquittal unless the government presents sufficient additional evidence to carry its burden in the issue of defendant's sanity. As we noted earlier, the question of sufficiency of the evidence to make an issue for the jury on the defense of insanity is a question of law to be decided by the trial judge. * * * If the district court, sitting without the presence of the jury, is satisfied by the government's presentation, it may order a new trial. * * * Even if the government presents additional evidence, the district court may refuse to order a new trial if he finds from the record that the prosecution had the opportunity fully to develop its case or in fact did so in the first trial. * * *

Petitioner's contention that the court of appeals was powerless under 28 U.S.C. 2106 to do anything but order the entry of a judgment of acquittal after it found the government's evidence on the issue of his sanity insufficient is foreclosed by Bryan v. United States, 338 U.S. 552. There this Court held that, where one seeking reversal of his conviction assigns a number of alleged errors on appeal, including denial of a motion for a new trial, the double jeopardy clause does not bar a second trial ordered pursuant to 28 U.S.C. 2106 (338 U.S. at 560). See also United States v. Musquiz, 445 F.2d 963 (C.A. 5); Greene v. Massey, 546 F.2d 51, 55 (C.A. 5); United States v. Howard, 432 F.2d 1188, 1191 (C.A. 9).

Contrary to petitioner's contention (Pet. 7-8), Green v. United States, 355 U.S. 184, does not undercut the long established principle on which Bryan was based -- that there is no double jeopardy bar to retrial of one who successfully

seeks appellate review of his conviction.[2] Indeed, in Forman v. United States, 361 U.S. 416, decided after Green, the Court reaffirmed the validity of Bryan and went on to state (361 U.S. at 425):

> It is elementary in our law that a person can be tried a second time for an offense when his prior conviction for that offense has been set aside by his appeal. United States v. Ball, 163 U.S. 662, 672 (1896); see also Green v. United States, 355 U.S. 184, 189 (1957). * * * Even though petitioner be right in his claim that he did not request a new trial with respect to the portion of the charge dealing with the statute of limitations, still his plea of Double Jeopardy must fail. Under 28 U.S.C. 2106, the court of appeals has full power to go beyond the relief sought. [3]

Petitioner's reliance on United States v. Wiley, 517 F.2d 1212 (C.A. D.C.) is also misplaced. In Wiley the court of appeals recognized that "the Double Jeopardy clause prevents retrials in insufficiency cases in general, but permits such retrial where the accused has waived the constitutional guarantee by moving for a new trial." 517 F.2d at 1216. Furthermore, unlike in Wiley, the government presented a prima facie case against petitioner. Indeed, petitioner admitted committing the acts charged and claimed insanity.

2/ Green merely held that while defendant, who had been charged with first degree murder and found guilty of second degree murder, could be retried for second degree murder following his successful appeal of his conviction, the Double Jeopardy Clause barred retrying him for first degree murder since he had been in effect acquitted on that charge in his first trial.

3/ This Court's short per curiam decision in Sapir v. United States, 348 U.S. 373, is also not to the contrary. In that case there was a total lack of evidence with respect to an essential element of the offense charged. Moreover, as the Court observed in Forman, supra, Sapir made no motion for a new trial in the district court, a factor considered decisive in his case. 361 U.S. at 426.

If the district court on remand enters a judgment of acquittal, the issue presented here will be moot. On the other hand, if this Court holds in Abney v. United States, No. 75-6521, argued January 17, 1977, as we have there argued, that a pretrial order denying a motion to dismiss an indictment on double jeopardy grounds is not appealable prior to trial, this petition should be denied since the issue presented will not be ripe for review. If the district court orders a new trial, petitioner's double jeopardy claim, assuming he presents it to the district court, will be preserved for appeal should he again be convicted.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

DANIEL M. FRIEDMAN
Acting Solicitor General. */

MAY 1977.

*/ The Solicitor General is disqualified in this case.

No. 76-6528

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

DAVID WAYNE BURKS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT

REPLY BRIEF TO BRIEF IN OPPOSITION

BART C. DURHAM, III
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-6528

DAVID WAYNE BURKS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT

REPLY BRIEF TO BRIEF IN OPPOSITION

MAY IT PLEASE THE COURT:

This Reply Brief is filed pursuant to Rule 24(4) of the Rules of this Honorable Court and is addressed only to arguments first raised in the Brief in Opposition.

ARGUMENT

1. The Petition for Writ of Certiorari was timely filed.

The appellate record clearly establishes the timeliness of this petition, and the Solicitor General asked for, and was in receipt of that record.

The record shows that following the denial of a Petition for Rehearing by the Sixth Circuit on February 8, 1977, the petitioner motioned the appellate court on two occasions for a stay of mandate pending his Petition for Writ of Certiorari. The first thirty day stay of mandate was ordered by the Sixth Circuit on February 18, 1977. A second thirty day stay of mandate was ordered March 9, 1977 until April 19, 1977.

This petition was thus timely filed in this Honorable Court.

2. Abney v. United States is inapposite.

The respondent offers this Court's decision in Abney v. United States, No. 75-6521, argued January 17, 1977, as a reason to deny the petition. This case is not at the pretrial stage but is already on review, and, as such, it is "ripe for review." Indeed, there are, as presented in petitioner's questions in his Petition for Writ of Certiorari, important legal and constitutional issues which respondent failed to even consider in their magnitude,which should be considered by this Honorable Court upon acceptance of the Petition for Writ of Certiorari.

3. United States v. Wiley supports petitioner's contentions.

Respondent states in his Memorandum in Opposition that petitioner's reliance on United States v. Wiley, 517 F.2d 1212 (C.A.D.C.) is misplaced. Petitioner used United States v. Wiley, supra, for one reason, that being that Judge Leventhal wrote the opinion in Wiley, and he recognizes and expresses in some length exactly what petitioner believes to be one important reason why this Honorable Court should grant the Petition for Writ of Certiorari. Petitioner, in relying on Wiley, is actually relying on Judge Leventhal's expostulations concerning the current state of appellate confusion among the circuit courts that would justify this Honorable Court's granting the Petition for Writ of Certiorari.

CONCLUSION

The Petition for Writ of Certiorari should be granted and the case set for hearing.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-6528

DAVID WAYNE BURKS,

Petitioner,

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE PETITIONER

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UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The judgment of the district court was entered February 25, 1976 (A. 13). The order of the district court denying the motion for new trial was entered March 12, 1976 (A. 18). The opinion of the United States Court of Appeals for the Sixth Circuit was filed December 30, 1976 and is reported at 547 F.2d 968. Petitions to rehear by both the United States and the defendant were denied February 8, 1977. (A. 159-160).

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered December 30, 1976. Petitions to

rehear filed by both petitioner and respondent were denied February 8, 1977. The petition for certiorari was filed April 11, 1977. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL, STATUTORY AND RULES PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides in pertinent part:

> No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb . . .

Rule 29(a) of the Federal Rules of Criminal Procedure provides:

> *Motion Before Submission to Jury.* Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses . . .

Title 28, United States Code provides:

> §2106. *Determination*
>
> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

QUESTIONS PRESENTED

1. Whether a retrial after a reversal for insufficient evidence violates the Double Jeopardy Clause of the Constitution.

2. Whether, assuming there is no violation of the Double Jeopardy Clause, the petitioner should be acquitted under 28 U.S.C. 2106 because just and appropriate.

STATEMENT

The petitioner Burks was charged with armed bank robbery in the Middle District of Tennessee. The petitioner entered a plea of not guilty by reason of insanity. At a jury trial in Nashville, two medical witnesses, a psychiatrist and psychologist, testified for the government. The psychiatrist could not give an opinion and the psychologist was ever asked for his opinion as to the sanity of the petitioner. Two psychiatrists and a psychologist called as witnesses by the petitioner testified he was legally insane within the meaning of the *Smith* test used in the Sixth Circuit. *United States v. Smith*, 404 F.2d 720 (C.A. 6).

A timely motion for a judgment of acquittal under Rule 29(a), F. R. Crim. P., was made at the close of all the proof and denied. (A. 145) The petitioner was found guilty and received a twenty year sentence.

The United States Court of Appeals for the Sixth Circuit found that the evidence was insufficient to sustain the verdict and reversed. Citing *Bryan v. United States*, 338 U.S. 552 and 28 U.S.C. 2106, the case was remanded to the district court to determine from a balancing of the equities whether a judgment of acquittal should be entered or a new trial ordered. This Court granted Burks' petition for certiorari June 13, 1977.

SUMMARY OF ARGUMENT

Appellate reversals for new trials after a finding of insufficient evidence to sustain the conviction violate the Double Jeopardy Clause of the Fifth Amendment. The Court has never given adequate consideration to the double jeopardy aspect of a reversal for insufficient evidence. *Bryan v. United States*, 338

U.S. 522, the leading case, failed to differentiate between appellate reversals for trial errors, for which there is a strong public policy favoring retrials, and reversals for insufficient evidence for which there is logically a strong public policy against retrials. To the extent that *Bryan* is based on the fact that a defendant "waives" his right to an acquittal for either lack of evidence or by seeking alternatively a new trial, that waiver doctrine was put to rest once and for all by *Green v. United States*, 355 U.S. 184.

In the event the Court does not wish to raise appellate reversals in the federal courts for insufficient evidence to a constitutional level, the Court under 28 U.S.C. 2106 should order the case dismissed as just and appropriate.

ARGUMENT

Introduction

The *Bryan* Rule and Its Historical Antecedents

"[I]t is well settled that there is no constitutional right to an appeal." *McKane v. Durston*, 153 U.S. 684. Indeed, for a century after this Court was established, no appeal as of right existed in criminal cases, and, as a result, appellate review of criminal convictions was rarely allowed.[1] As the Court described this period in *Reetz v. Michigan*, 188 U.S. 505:

> 'Trials under the Federal practice for even the gravest offenses ended in the trial court, except in cases where two judges were present and certified a question of law to this Court. *Id.*, at 508.'
>
> *Abney v. United States*, No. 75-6521, decided June 9, 1977.

[1] "[3] Appeals as of right in criminal cases were first permitted in 1889 when Congress enacted a statute allowing such appeals 'in all cases of conviction of crime the punishment of which provided by law is death.' Act of Feb. 6, 1889, 25 Stat. 656. A general right of appeal in criminal cases was not created until 1911. Act of March 3, 1911, 36 Stat. 1133."

Writing in *Green v. United States*, 355 U.S. 184, Justice Black said:

> The constitutional prohibition against 'double jeopardy' was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense. In his Commentaries, which greatly influenced the generation that adopted the Constitution, Blackstone recorded:
>
> > '. . . the plea of auterfoits acquit, or a former acquittal, is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life more than once for the same offence.'
>
> Substantially the same view was taken by this Court in Ex parte Lange, 18 Wall 163, at 169, . . . :
>
> > 'The common law not only prohibited a second punishment for the same offence, but it went further and forbid a second trial for the same offence, whether the accused had suffered punishment or not, and whether in the former trial he had been acquitted or convicted.'
>
> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

The relationship between the double jeopardy clause and retrial after appellate reversal began with *Ball v. United States*, 163 U.S. 662, 672, when it was held a defendant could be retried

> because it is quite clear that a defendant, who procures a judgment against him upon an indictment to be set aside, may be tried anew upon the same indictment or upon another indictment, for the same offense of which he had been convicted.

Ball and its progeny rested on the theory that the defendant by

asking for a new trial had "waived" a double jeopardy defense. *Trono v. United States*, 199 U.S. 521. The plurality opinion in *Trono* said:

> We do not agree to the view that the accused has the right to limit his waiver as to jeopardy, when he appeals from a judgment against him. As the judgment stands before he appeals, it is a complete bar to any further prosecution for the offense set forth in the indictment . . . No power can wrest from him the right to so use that judgment, but if he chooses to appeal from it . . . he thereby waives, if successful, his right to avail himself of the former acquittal of the greater offense. 199 U.S. at 533.

Ball involved a reversal for a defect in the indictment. A comprehensive history of the Double Jeopardy Clause is given in *United States v. Wilson*, 420 U.S. 332.

This Court first considered the constitutionality of a reversal for a new trial after an appellate reversal for insufficient evidence in *Bryan v. United States*, 338 U.S. 552. After first deciding that 28 U.S.C. 2106 took precedence over Rule 29(a), F. R. Crim. P., petitioner's double jeopardy argument was given short shrift:

> Petitioner's contention that to require him to stand trial again would be to place him twice in jeopardy is not persuasive. He sought and obtained the reversal of his conviction, assigning a number of alleged errors on appeal, involving denial of his motion for judgment of acquittal. '. . . where the accused successfully seeks review of a conviction, there is no double jeopardy upon a new trial.' *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 462. See *Trono v. United States*, 199 U.S. 521, 533, 534. 338 U.S. at 560.

The two cases cited in support of the Court's holding involved reversals for procedural errors, rather than for insufficiency of evidence. The holding in *Bryan* has been considered tangentially but never directly in *Sapir v. United States*, 348 U.S. 373,[2]

[2]Brief per curiam order that indictment be dismissed after appellate reversal for insufficient evidence. Impossible to tell if dismissal on constitutional grounds or §2106. Mr. Justice Douglas in a concurring opinion noted that a new trial would be double jeopardy. 348 U.S. at 374.

Yates v. United States, 354 U.S. 298,[3] and *Forman v. United States*, 361 U.S. 416.[4] See also *United States v. Tateo*, 377 U.S. 463, 466.[5] The holding in *Bryan* has been criticized by every court or commentator which has attempted an analysis.[6]

Many circuits have not repudiated *Bryan* but have strictly limited its application to cases wherein the accused requested a new trial in the district court or on appeal. These circuits, under the statutory authority of 28 U.S.C. 2106, have established the policy of directing acquittals following reversals for insufficiency of the evidence.[7]

[3]*Bryan* reaffirmed without discussion. "[W]e would no doubt be justified in refusing to order acquittal even where the evidence might be deemed palpably insufficient, particularly since petitioners have asked in the alternative for a new trial as well as for acquittal." 354 U.S. at 328.

[4]Attempt to reconcile *Bryan* and *Sapir*. Validity of *Sapir* implicitly recognized.

[5]*Bryan* apparently reaffirmed by way of citation.

[6]*Sumpter v. DeGroote*, C.A. 7, No. 76-1849, decided April 1, 1977; *United States v. Wiley*, 517 F.2d 1212, 1215-1217 (C.A. D.C. 1975); *People v. Brown*, 99 Ill. App. 2d 281, 241 N.E.2d 653, 661-62 (1968); C. Wright, *Federal Practice and Procedure*, §470, at 272-273; Thompson, *Reversals for Insufficient Evidence: The Emerging Doctrine of Appellate Acquittal*, 8 Ind. L. Rev. 497, 507-510 (1975); Note, *Double Jeopardy: A New Trial After Appellate Reversal for Insufficient Evidence*, U. Chi. L. Rev. 365, 367 (1964); Cahan, *Granting the State a New Trial After an Appellate Reversal for Insufficient Evidence*, 57 Ill. B.J. 448, 452-455 (1969); Mayers and Yarbrough, Bis Vexaris: *New Trials and Successive Prosecutions*, 74 Harv. L. Rev. 1, 6-7, 19-22 (1960); 8 Moore's *Federal Practice*, §29.09[2] at 29-57 (1976); Fisher, *Double Jeopardy: Six Common Boners Summarized*, 15 U.C.L.A. Law Review 81-84 (1967).

[7]*Green v. Massey*, 546 F.2d 51 (C.A. 5); *United States v. Howard*, 432 F.2d 1188 (C.A. 9); *United States v. Wiley*, 517 F.2d 1212, 1215-1221 (C.A. D.C. 1975); *United States v. Dotson*, 440 F.2d 1224, 1225 (C.A. 10); *United States v. Howard*, 432 F.2d 1188, 1191 (C.A. 9); *United States v. Williams*, 348 F.2d 451 (C.A. 4), *cert. denied*, 384 U.S. 1022. See also, *United States v. Fusco*, 427 F.2d 361, 363 (C.A. 7); *Wright, supra*, note 6, at 272; *United States v. Robinson*, 545 F.2d 301, 305, n.5 (C.A. 2).

The Sixth Circuit has been inconsistent. This case was remanded for a possible new trial. In another case, *United States v. Rosenbarger*, 536 F.2d 715, 721, after a reversal for insufficient evidence, the Sixth Circuit said: "To allow the Government on remand to submit additional proof . . . would violate the prohibition against double jeopardy contained in the Constitution."

I.

A RETRIAL AFTER A REVERSAL FOR INSUFFICIENT EVIDENCE VIOLATES THE DOUBLE JEOPARDY CLAUSE OF THE CONSTITUTION.

Bryan has been unanimously criticized insofar as it dealt with the double jeopardy issue.[8] The double jeopardy question received only cursory consideration in the last paragraph of the twelve-paragraph opinion.

Judge Bauer for the Seventh Circuit in *Sumpter v. DeGroote*, *supra*, wrote:

> Moreover, rather than serving the 'sound administration of justice,' we believe the *Ball* rule operates in practice as an engine of inequity when applied in cases such as *Bryan*. Unlike reversals due to procedural errors of law that impair effective presentation of the defendant's case, reversals based on the failure of the prosecution's proof represent the judgment of an appellate court that the defendant was entitled to a directed acquittal at trial. By subjecting defendants who win such appellate reversals to retrial, *Bryan* serves to heighten rather than mollify disparities inherent in our criminal justice system, for, had the defendants been before other trial judges, they may well have received the directed acquittals to which they were entitled—acquittals from which the prosecution would have no appeal. *Fong Foo v. United States*, 369 U.S. 141 (1962). By permitting defendants similarly situated with respect to their right to a directed acquittal to be treated differently, *Bryan* works to undermine rather than promote the fair and impartial administration of criminal justice.
>
> In summary, we believe that the premises of the fairness rationale for the *Ball* rule adopted in *Wilson*—the societal interest in punishing the guilty and the need to promote the sound administration of justice—do not require the rule's application in a case such as this. Sumpter was, by the

[8]The primary issue in *Bryan* was whether Rule 29(a), F. R. Crim. P. takes precedence over 28 U.S.C. 2106. *Held*, §2106 was controlling.

For authorities suggesting *Bryan* should be re-examined see n.6, *supra*.

> Indiana Supreme Court's own admission, not proven guilty of the crime of prostitution as defined by the Indiana law applicable at the time of her arrest and trial. The State, having been given an opportunity to vindicate its interest in trying her, had failed to establish the validity of its interest in punishing her. To permit the State a second bite at the apple in these circumstances would not only interject inequity into the administration of criminal justice but also serve to condone and perhaps perpetuate careless prosecutorial trial preparation and practice. (Footnotes omitted.)

It is said in Thompson, n.6, *supra*, at 506-507, 510:

> The Court in *Bryan* failed to note that the earlier cases upon which it relied involved reversals for procedural irregularities, and the evidence in those cases was sufficient to sustain the judgments. Without considering this distinction, the Court summarily applied the rule of *Ball* that a defendant who secures an appellate reversal of his conviction may not claim double jeopardy as a defense to retrial — regardless of the reason for reversal.
>
> * * *
>
> Moreover, if the Court were faced with the issue again, it is doubtful, at least in a federal case, whether it would continue to follow the *Bryan* rationale. The logic of the state court decisions and the emerging doctrine of appellate acquittal which has developed after the decision in *Forman* [*v. United States, supra*] is irrefutable. And the Court has not been reluctant in recent years to expand the application of the double jeopardy principle.

As said in Comment, 31 U. Chi. L. Rev. 365, n.6, *supra*:

> The cursory treatment given the double jeopardy problem in the *Bryan* case reveals the Court's feeling that no new, significant double jeopardy question had been presented.

Reversals for insufficient evidence as in *Bryan* present a significantly different double jeopardy question than do reversals for procedural errors. Furthermore, the waiver rationale of *Bryan* was rejected in *Green v. United States*, 355 U.S. 184.

A. Reversal for Insufficient Evidence Should Result In Acquittal Because Such Reversal Differs Significantly from Reversal for Procedural Error.

It was said in Comment, 31 U. Chi. L. Rev. 365, 371, 372:

> [T]he considerations which justify a new trial after a reversal for error are lacking where the reversal is for lack of evidence. Instead of a presumption that the burden of proof of the prosecution has probably been met, the appellate court is specifically holding that the burden has not been met. Society should have no more fear of releasing such a defendant than of releasing a defendant who has been acquitted by a jury, perhaps even less since a jury acquittal may be based on error or on an improper weighing of the evidence. Yet in the federal system and in most states, no appeal is allowed the state after an acquittal.
>
> Furthermore, there is no reason to fear that an appellate court judge, deprived of the new trial alternative, would affirm a conviction where he now would reverse and grant a new trial for insufficient evidence. In the federal courts it is not enough for a judge to feel that on his reading of the record he would have voted for acquittal. 'It is not for [a reviewing court] . . . to weigh the evidence or to determine the credibility of witnesses. The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it.' Thus where a judge now would be willing to reverse, he should have no objection to acquitting. He certainly should not prefer the conviction of a defendant where he not only would vote for acquittal himself but also thinks that there is no substantial evidence to support the trial court conviction.
>
> * * *
>
> No undue burden is imposed on society by releasing those defendants whose convictions have been reversed for lack of evidence. The oppression and harassment which the double jeopardy clause was designed to prevent is clearly present in a new trial following a reversal for insufficient evidence. For in the insufficient evidence case an appellate court is in essence saying, 'Well, the prosecution did not prove you guilty this time but they can have another chance.' Although it would not be necessary for the Supreme Court to raise the distinction between reversal for error and reversal for insufficient evidence to the stature of a constitutional principle—invocation of the Court's supervisory power might be considered more appropriate—the Court should explicitly recognize that the same considerations which prohibit a new trial where an accused has been acquitted at trial apply with equal force following an appellate reversal for insufficient evidence.

It is said in Thompson, *Reversals for Insufficient Evidence*, n.6 *supra*, at 501-502, 513, 514-515, 517-518:

> The arguments favoring application of the double jeopardy clause to appellate reversals for insufficient evidence are compelling. At the first trial the State exercised its opportunity to convict the accused and, as a matter of law, the evidence failed to establish guilt. Should the State be given the opportunity to buttress its case at a second trial or, for harassment only, seek a second guilty verdict on the same insufficient evidence? By reason of the insufficiency the judgment of conviction was reversed. Clearly, the defendant should have been acquitted in the trial court, and that acquittal would have barred a second trial for the same offense. Logic would dictate a similar result when the acquittal comes at the appellate level, for it is a miscarriage of justice that the defendant was not acquitted at trial.
>
> * * *
>
> There is no substantial difference between a defendant who requests a directed verdict and one who raises the issue for the first time in the motion to correct errors. Both are calling the attention of the trial court to the legal insufficiency of the evidence and are requesting appropriate relief. In either case the trial court is empowered to acquit the accused. A review of the policies underlying the double jeopardy provisions reveals no basis upon which such differential treatment could be grounded. Fundamentally, the State is given one opportunity, and one only, to convict a citizen of a crime. The purpose of the double jeopardy clause is to protect the individual from the hazards of repeated trials and possible conviction for the same offense.

* * *

[A] defendant who was improperly acquitted in the trial court is free from further prosecution. Yet a defendant who was entitled to acquittal in the trial court but was compelled to appeal from an improper conviction may be subjected to retrial. No justification for such disparate treatment exists. This injustice is especially pervasive when an appellant, who was wrongfully convicted, remains incarcerated pending his appeal because of his inability to make bail. Even though the costs of his legal defense may be borne by the county, an impecunious defendant pays for his retrial through loss of liberty.

Moreover, the effect of the present state of the law could be to afford broader constitutional protection to a defendant who is shown to be prima facie guilty. Even if palpably erroneous, a directed verdict of acquittal at the trial level could protect a guilty defendant from the hazards of retrial after a reversal of the conviction upon appeal. On the other hand, a defendant who is not shown to be prima facie guilty, and who in fact may be innocent, could be subjected to a new trial. Thus, the present state of the law in the context of individual cases is calculated to shield the guilty and persecute the innocent.

* * *

Different considerations are apparent with respect to reversals for reasons other than insufficient evidence. For example, when a reversal is based upon improper jury instructions or some pretrial procedural irregularity, a defendant may have been denied a fair trial even though the evidence of guilt was overwhelming. It is far better that a defendant be given a fair trial upon remand than to extend the harmless error doctrine as a basis for affirmance. In such a case, the accused was not entitled to acquittal in the trial court, nor should such relief be afforded in the appellate court. The security of the community at large may be preserved by a new trial while also securing the defendant's right to a fair trial. The defendant who is not shown to be prima facie guilty, however, in theory, represents no threat to the community. Whether the defendant in such a case is acquitted at trial or upon appeal should make no difference. In either case the accused should not be retried.

Moreover, the security of the community, preserved by the imposition of criminal sanctions, has never been the sole consideration of our criminal justice system. Even though defendants may be guilty, countervailing policies immunize from prosecution those who have been denied their rights to speedy trials or who have not been brought to justice within the statutory period. If public policy requires retrial of defendants acquitted upon appeal, it can also be argued that the same policy requires retrial of defendants acquitted in the trial court. In either case, the State may be able to develop additional evidence sufficient to support a conviction. The double jeopardy bar, however, was explicitly designed to prohibit this kind of continuing persecution of the accused.

B. The Petitioner Did Not Waive His Right to an Acquittal by Taking an Appeal.

Early decisions of this Court posited that the accused "waived" his double jeopardy rights by taking an appeal. *Murphy v. Massachusetts*, 177 U.S. 155, 158 ("[A] convicted person cannot by his own art avoid the jeopardy in which he stands, and then assert it as a bar to subsequent jeopardy.")

United States v. Ball, 163 U.S. 662, 672 said:

> [I]t is quite clear that a defendant who procures a judgment against him upon an indictment to be set aside, may be tried anew upon the same indictment, or upon another indictment, for the same offense of which he had been convicted.

The *Ball* doctrine for years was unanimously accepted by the courts. The dominant theory was that the defendant, by successfully appealing his erroneous conviction, "waived" the protection against being retried for the same offense which the former judgment afforded him.

As said in Mayer and Yarbrough, n.6, *supra*, at 6:

> Yet it is obvious that a waiver rationale here, as elsewhere, serves only to state the conclusion without explaining the reason for it. The defendant, if given his

> choice, would prefer both to have and eat his cake; but the term 'waiver' connotes a voluntary act. Furthermore, the waiver theory must start with the assumption that the Constitution itself protects the defendant from a new trial after appeal, absent his consent. If this premise were correct, then Justice Holmes' criticism of the waiver rationale would seem indisputable: '[I]t cannot be imagined that the law would deny to a prisoner the correction of a fatal error unless he should waive other rights so important as to be saved by an express clause in the Constitution. . .' [*Kepner v. United States*, 195 U.S. 100, 135 (dissenting opinion)].

The "waiver" theory was dismissed by this Court in the double jeopardy decision of *Green v. United States*, 355 U.S. 184, 192 where the waiver argument was said to be "wholly fictional." The Court found a defendant convicted of a serious crime "has no meaningful choice" but to appeal his conviction. Such an appeal could not be termed a voluntary knowing relinquishment of a right. Cf. *Johnson v. Zerbst*, 304 U.S. 458.

C. The Petitioner Did Not Waive His Right to an Acquittal by Asking for a New Trial.

The petitioner seeks a new trial only as an alternative to a judgment of acquittal. Here, counsel at the conclusion of all the proof moved for a judgment of acquittal (A. 145). The petitioner is not asking to be tried over again. He is merely asking for his legal rights. Rule 29(a), F. R. Crim. P., provides the trial court "shall" acquit him "after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses."

Mr. Justice Douglas in a concurring opinion in *Sapir v. United States, supra*, 348 U.S. 373, 374, wrote:

> If the petitioner had asked for a new trial, different considerations would come into play for then the defendant opens the whole record for such disposition as might be just.

Sapir was decided two years before *Green, supra* which held "wholly fictional" the old waiver rule. As said by the court in *People v. Brown*, 99 Ill. App.2d 281, 241 N.E.2d 653, 662 (1968):

> We can think of no reason in fairness and justice why a defendant on appeal should be required to discard his right to seek a new trial based on trial errors, in order to validate his right to seek an outright reversal for lack of evidence. In any sensible consideration of his position the former is seen to be a second-choice alternative to the latter. If his double jeopardy rights are deemed to have been waived by his request for a new trial, the waiver should then take effect only if the reversal is granted for the reasons contained in the new-trial request, and, if the conviction is reversed for lack of evidence, the waiver contained in an accompanying request for a new trial would never become operative.

Application of the waiver doctrine results in an anomoly. A trial court must ("shall") enter a judgment of acquittal as a matter of right to the defendant, whereas the appellate court has discretion to order a new trial. The unfairness is increased if we accept the proposition that appellate courts sitting in panels and with more time for reflection err less frequently than would a trial judge, especially since the trial judge would ordinarily make his decision without the written transcript.

> A defendant convicted on insufficient evidence is in a similar plight. He could, of course, serve his sentence and be free of a subsequent prosecution, but this is hardly an acceptable alternative. If he appeals on the ground that he should have been acquitted at trial, and the appellate court is in accord, why should he be any more subject to retrial than his counterpart who was acquitted at trial? By imposing a coerced waiver of the double jeopardy defense, courts penalize the accused for successfully attacking an erroneous judgment. The extension of the *Green* rationale to reversals for insufficient evidence would invalidate *Bryan* as a basis for remand and retrial. Thompson, n.6, *supra*, at 516-517.

The petitioner should not be denied a judgment of acquittal to which he is entitled on a theory this Court characterized as

"wholly fictional" in *Green, supra*. There is no reason why the defendant would "waive" an acquittal by asking for a new trial as alternative relief. Judicial notice could be taken that any defendant would rather have an acquittal than a new trial.

II.

ASSUMING THERE IS NO VIOLATION OF THE DOUBLE JEOPARDY CLAUSE, THE PETITIONER SHOULD BE ACQUITTED UNDER 28 U.S.C. 2106 BECAUSE JUST AND APPROPRIATE.

A literal absolutist interpretation of the Double Jeopardy Clause would not distinguish between reversals for trial errors or reversals for insufficient evidence. Policy considerations have determined over the years the scope of the clause. Justice Harlan in *United States v. Tateo*, 377 U.S. 463, 466 argued that appellate courts would be very reluctant to reverse a conviction if retrial were not available:

> While different theories have been advanced to support the permissibility of retrial, of greater importance than the conceptual abstractions employed to explain the *Ball* principle are the implications of that principle for the sound administration of justice. Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction. From the standpoint of a defendant, it is at least doubtful that appellate courts would be as zealous as they now are in protecting against the effects of improprieties at the trial or pretrial stage if they knew that reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution. In reality, therefore, the practice of retrial serves defendant's rights as well as society's interest.

As a matter of fundamental fairness, apart from Fifth Amendment reasons, society has no interest in retrying a defendant against whom the evidence was insufficient at the first trial. The fairness rationale of *Tateo, supra*, would forbid a second trial in insufficiency cases in general for two reasons.

First, the prosecution must be on its toes to put forth all the evidence the first time. In both *Brown* and *Wiley, supra*, the prosecutors asked for retrials, pointing out that additional witnesses could be called the second time around. These arguments were rejected as fundamentally unfair. This point was illustrated by the court in *Brown*, n.6, *supra*, 241 N.E.2d 653, 660 n.3:

> In his petition for rehearing, the State's Attorney seeks to support his argument by noting that, in answer to a Bill of Particulars, the State listed 18 possible witnesses, whereas at the trial only 7 took the stand. We do not consider that an adequate representation has been made as to the additional evidence which would, with certainty, be presented at a new trial, even if this were clearly the only criterion for remandment. This case thus presents a good example of what we have in mind: at a second trial the State might use 10 or 12 witnesses and, if reversed again, maybe 15 would be presented at a third trial, and so on. Only one witness is claimed to have been unavailable (absent from the city) at the time of trial. The record does not disclose, however, that the State made any attempt to obtain a continuance on that account, pursuant to the Code of Criminal Procedure, Ill. Rev. Stat. (1965), ch. 38, §114-4(c)(2).

Having remanded for a new trial, it would appear to be impractical for a reviewing court to attempt control of such trial to insure that evidence more satisfactory to the prosecution would be introduced. The new trial could not very well be granted on that condition (even if we were to consider this a desirable procedure, which we do not), and, if it were, the standard would be impossible of practical application. Suppose, further, that the State were to introduce only the same evidence at the new trial and manage again to obtain a conviction. What then? Nor would an acquittal in this circumstance serve as a solution to the problem, because the constitutional guaranty is not against

a second conviction, but against being placed in repeated jeopardy through trial. See also, Cahan, n.6, *supra*, at 461.

Second, defendants may be treated unfairly by the same court. *Compare* the reversal by the Sixth Circuit in *United States v. Rosenbarger, supra, with* the Sixth Circuit's treatment of the defendant in this case.

In an earlier case where the Sixth Circuit reversed for lack of evidence of sanity of the defendant, the remand was to the district court for a hearing with instructions to grant a new trial or dismiss "unless the Government was unfairly prevented from producing competent evidence." *United States v. Smith*, 437 F.2d 538, 542. The remand in the instant case from the Sixth Circuit adopts a different standard in use in another circuit. See *United States v. Bass*, 490 F.2d 846, 852-853 (C.A. 5) (District judge may refuse to permit a retrial "if he finds from the record that the prosecution had the opportunity to develop its case . . . at the first trial.")

An egregious disparity of treatment was given as an illustration in Cahan, n.6, *supra*, at 449. Two defendants were convicted separately and independently of the crime of rape. Both cases were reversed by reviewing courts because the evidence was neither clear and convincing nor corroborated as required by law. One case was remanded for retrial and the other was reversed outright.

There is no evidence here that admissible evidence which would have made the Government's case was wrongfully withheld. No failure of the petitioner contributed to this failure of the Government to make a case. Using its power under §2106, the Court should order the entry of a judgment of acquittal if it finds no Fifth Amendment violation. The standards for the district judges on remand should be made uniform in each circuit.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that a judgment of acquittal should be ordered to be entered. If remanded, the standard should be a new trial only if the Government was unfairly prevented from producing evidence at the previous trial.

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In the Supreme Court of the United States

OCTOBER TERM, 1977

DAVID WAYNE BURKS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinion of the court of appeals (A. 155–158) is reported at 547 F.2d 968. The opinion of the district court (A. 18–20) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on December 30, 1976. Petitions for rehearing filed by both petitioner and the United States were denied on February 8, 1977 (A. 159–160). The petition for a writ of certiorari was filed on April 11, 1977,[1] and was

[1] The petition was 32 days out of time under Rule 22(2) of the Rules of this Court. Petitioner has offered the explanation that a

granted on June 13, 1977 (A. 161). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Double Jeopardy Clause invariably bars a retrial after a court of appeals concludes that the evidence, although sufficient to show commission of the crime, does not adequately establish the defendant's sanity.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part:

> * * * [N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb * * *.

28 U.S.C. 2106 provides:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

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stay of mandate granted by the court of appeals extended the time within which to file a petition. This is incorrect; the time within which to file a petition runs from the entry of judgment or, in this case, from the denial of a petition for rehearing. The critical date is the date on which the judgment becomes final, not the date upon which it becomes effective. *Department of Banking* v. *Pink*, 317 U.S. 264, 266; *Boylan* v. *United States*, 257 U.S. 614; *Pfister* v. *Northern Illinois Finance Corp.*, 317 U.S. 144, 149–150. The date on which mandate issues therefore is irrelevant unless the appellate court treats its mandate as its judgment. *Commissioner* v. *Estate of Bedford*, 325 U.S. 283; *Dann* v. *Chatfield*, certiorari denied, October 3, 1977 (No. 76–1559). The Sixth Circuit does not treat its mandate as its judgment, and the petition is therefore untimely. Cf. *Schacht* v. *United States*, 328 U.S. 58, 64 (the time requirements of Rule 22(2) are not jurisdictional and may be relaxed "when the ends of justice so require").

STATEMENT

An indictment returned in the United States District Court for the Middle District of Tennessee charged petitioner with robbing a federally insured bank by use of a dangerous weapon, in violation of 18 U.S.C. 2113(d), and with kidnapping to avoid apprehension for the robbery, in violation of 18 U.S.C. 2113(e) (A. 4–5). Before trial the kidnapping count was dismissed on the government's motion (Tr. 14).

At trial petitioner challenged the sufficiency of the proof of the robbery; his major defense, however, was that he was insane at the time of the robbery. He called three expert witnesses who testified, albeit with differing diagnoses of petitioner's condition, that he "suffered from a mental illness at the time of the bank robbery and that he was substantially incapable of conforming his conduct to the requirements of the law against robbing banks" (A. 155).

The prosecution called two expert witnesses. The first, Dr. R. James Farrer, agreed with two of petitioner's experts that petitioner possessed a "character disorder" and had robbed the bank as a means "to solve inner problems" by getting caught, but he refused to classify petitioner as "mentally ill" (A. 113–116, 122). The second expert, Dr. Denton Buchanan,

also acknowledged that petitioner had a character disorder manifested by an occasional "defiant act," in this case robbing the bank "to get caught, [as] a way of being defiant towards his parents" (A. 128–129, 135, 138). Asked whether in his judgment petitioner had been able on the day of the robbery to "conform his conduct to the rules of society," Dr. Buchanan stated that petitioner's conduct in preparation for the robbery showed that he was "capable of obeying at least some laws but [that] clearly by [his] behavior he did not obey another law" (A. 142–143). Dr. Buchanan explained that petitioner is aggressive but that "[t]here is no indication of a psychotic process at present or the remnants of a previous psychotic reaction. [Petitioner's] intellectual functioning is in the superior range" (A. 126).

Finally, the prosecution produced testimony of eyewitnesses to the robbery, of a taxi driver who had encountered petitioner immediately before the robbery, and of the arresting officers; these witnesses agreed that petitioner appeared to be fully in control of himself at the time of the robbery (A. 23–24, 29; Supp. Tr. 27–29). Petitioner's employment supervisor also testified that, during the weeks preceding the robbery, petitioner had been able to perform the tasks demanded by his job (A. 157).

Before the case was submitted to the jury, the district court invited petitioner to move for a judgment of acquittal; petitioner did so, and the court promptly denied the motion (A. 145). The case was submitted to the jury, which returned a verdict of guilty (A. 154).

Petitioner then filed a motion for a new trial, contending, among other things, that "[t]he evidence was insufficient to support the verdict" (A. 15). Petitioner did not file a motion for a judgment of acquittal, although Fed. R. Crim. P. 29(c) provides that such motions may be filed within seven days of the verdict.

The district court denied the motion for a new trial (A. 18–20). It concluded that the contention "that the evidence was insufficient to support the verdict * * * is utterly without merit" (A. 18). The court sentenced petitioner to 20 years' imprisonment, with immediate eligibility for parole (A. 13–14).

On appeal, petitioner conceded that he robbed the bank as charged (A. 158). The only questions on appeal therefore concerned the insanity defense. The court of appeals concluded that the government's evidence had not "effectively" (A. 157) overcome the *prima facie* showing by petitioner's experts that petitioner was insane at the time of the robbery. The court believed that the prosecution's witnesses, despite having given "detailed accounts of their contacts with [petitioner] and opinions concerning his emotional problems, [had] * * * not express[ed] definite opinions on the precise questions which this court has identified as critical in cases involving the issue of sanity" (A. 157). Because the witnesses had not expressed their opinions on the ultimate questions, the court held, the evidence of sanity was insufficient.

The court observed that petitioner had moved for a new trial because of the insufficiency of the evidence, and it remanded the case for a hearing at which the district court is to determine whether the

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prosecutor has additional evidence to present on the issue of petitioner's sanity (A. 157–158). It instructed the district court to "balanc[e] * * * the equities" at the hearing and either to enter a judgment of acquittal or to set the case for retrial (A. 158).[1] The court of appeals adopted the standards and procedures outlined in *United States* v. *Bass*, 490 F. 2d 846, 852–853 (C.A. 5) (see A. 158):

> [W]e reverse and remand the case to the district court where the defendant will be entitled to a [judgment] of acquittal unless the government presents sufficient additional evidence to carry its burden on the issue of defendant's sanity. * * * If the district court, sitting without the presence of the jury, is satisfied by the government's presentation, it may order a new trial. * * * Even if the government presents additional evidence, the district court may refuse to order a new trial if he finds from the record that the prosecution had the opportunity fully to develop its case or in fact did so at the first trial.

Under this standard petitioner will be exposed to a second trial if (a) the prosecution offers additional evidence sufficient to establish petitioner's sanity, and (b) the prosecution establishes that it did not have the opportunity fully to develop its case at the first trial.

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[1] The court of appeals referred to a "directed verdict * * * of acquittal," but directed verdicts have been abolished. Fed. R. Crim. P. 29(a).

SUMMARY OF ARGUMENT

A. It has long been settled that a defendant may be retried after his conviction has been reversed at his request. *United States* v. *Ball*, 163 U.S. 662. Although a number of rationales have been advanced for this unquestioned rule, the most satisfactory is that second trials often represent the best resolution of whatever conflict there may be between the defendant's interest in avoiding multiple trials and the public interest in obtaining convictions of those guilty of crime. The decision to allow reprosecution "reflects the judgment that the defendant's double jeopardy interests, however defined, do not go so far as to compel society to so mobilize its decisionmaking resources that it will be prepared to assure the defendant a single [trial] free from harmful governmental or judicial error." *United States* v. *Jorn*, 400 U.S. 470, 484 (plurality opinion).

B. The conclusion that a second trial represents the fairest resolution of the competing interests is least strong when the evidence is insufficient at the first trial to support a conviction. The Double Jeopardy Clause was designed, in part, to prevent the prosecution from having repeated opportunities to muster enough evidence to convict the defendant. But the Court held in *Bryan* v. *United States*, 338 U.S. 552, that the Double Jeopardy Clause does not prohibit a second trial after a conviction has been reversed for insufficient evidence.

Bryan has been criticized, and to the extent it holds that a defendant uniformly may be tried a second time

after reversal on appeal, it has been undermined by subsequent cases. But the rationale for permitting retrials applies in many cases that might be characterized as reversals for insufficiency of the evidence. Although no rule uniformly permitting retrials is appropriate, neither is a rule uniformly forbidding retrials consistent with the ends of public justice.

C. There is no bright line between insufficiency of the evidence and legal error that would justify a rule uniformly forbidding retrials in the former situation and uniformly permitting it in the latter. In a real sense, decisions about the sufficiency of evidence frequently turn on questions of law. The decision of the prosecutor to present particular evidence and ask particular questions is influenced by his (and the trial court's) understanding of the legal rules governing proof of the offense, so that an appellate finding of evidentiary insufficiency may be intimately intertwined with legal mistakes by the trial participants.

For example, the prosecutor may rely for part of his proof on presumptions and inferences, the propriety of which creates legal questions. The prosecutor and trial court may misunderstand the elements of the offense that need to be proved. "Variance" between pleading and proof can be viewed as either a deficiency in the evidence or as an error in drafting the indictment. The evidence might establish an offense other than that charged in the indictment; that, too, may be only a drafting error. The court may submit the case to the jury on a theory unsupported by the

evidence, although the proof at trial made out the offense charged under the proper theory. A court may improperly exclude relevant evidence, as a result of which the remaining evidence is insufficient. Or a court may erroneously admit evidence and the prosecutor, in reliance on that decision, may elect not to offer other (admissible) evidence that would have established the offense.

In the present case the court of appeals apparently concluded that the government's expert witnesses should have addressed themselves directly to the ultimate issue whether petitioner had substantial capacity to conform his conduct to the requirements of the law. But whether such opinion testimony is required—or whether, instead, jurors may infer such conclusions from the other testimony of the expert witnesses—is as much a legal as a factual question. The defect identified by the court of appeals therefore may have been caused by a mistake of law shared by the prosecutor and the district court rather than by any inability to prove that petitioner had committed the offense.

Even when no legal problem is mingled with the factual insufficiency, significant considerations support recognition of judicial discretion to order a second trial. This Court explained in *United States* v. *Tateo*, 377 U.S. 463, 466, that "it is at least doubtful that appellate courts would be as zealous as they now are in protecting against * * * improprieties at trial * * * if they knew that reversal of a conviction would put the accused irrevocably beyond the reach of

further prosecution." That consideration applies to cases in which the evidence is insufficient no less than to cases in which the trial may have been beset by procedural error. When the sufficiency of the evidence is doubtful, but the appellate court is not convinced that the defendant should be discharged entirely, a remand for a second trial may be the fairest solution for all concerned.

Affirmative defenses such as insanity present special problems in this regard. Sanity is not necessarily an element of the offense, and questions about mental condition may take the trial far afield from the usual questions of factual guilt. When the statutory elements of the offense have been established beyond question, as they have been here (petitioner has conceded that he robbed the bank), and when the evidence addressed to the affirmative defense is strong enough to persuade a jury to convict and to persuade a district court to deny a motion for a judgment of acquittal, it is not unfair to permit a second trial if an appellate court should conclude that the evidence was defective in some respect not perceived at trial.

D. The statute governing further proceedings after a reversal on appeal provides that the appellate court may direct the holding of such further proceedings as are "just" and "appropriate." 28 U.S.C. 2106. We believe that the statute and the Double Jeopardy Clause both establish a test under which the defendant's interests and those of the state must be considered and fairly reconciled. The defendant has an

important interest in avoiding being subjected to repeated trials at which the prosecutor attempts to supply the evidence necessary to support a conviction. But where the defect at the first trial is based upon a mistake of law rather than upon simple factual insufficiency, or where the prosecutor cannot reasonably be faulted for any factual insufficiency, the interest in accurate resolution of criminal charges outweighs the interest of a defendant in avoiding a second trial after conviction at the first.

The ends of public justice should be the guiding criterion. Under the approach we have outlined—an approach that several courts of appeals have adopted [8]—there can be no second trial if the evidence at the first was insufficient *and* there is no good excuse for that insufficiency. A second trial would be appropriate only if (a) it appears that the prosecutor can supply at the second trial the evidence that was missing at the first, and (b) the prosecutor can demonstrate that there was a good reason why the evidence was not presented at the first trial. Under this approach second trials would be the exception, not the rule. But when these conditions are present, second trials serve the ends of public justice and are consistent with the principles of the Double Jeopardy Clause.

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[8] See, *e.g.*, *United States* v. *Wiley*, 517 F. 2d 1212 (C.A. D.C.); *United States* v. *Howard*, 432 F. 2d 1188, 1191 (C.A. 9) (opinion of Ely and Hufstedler, JJ.). See also *United States* v. *Steinberg*, 525 F. 2d 1126, 1134–1135 (C.A. 2) (Friendly, J., concurring). See also note 26, *infra*.

The court of appeals remanded the present case to permit the district court to conduct an inquiry into the ability of the prosecutor to offer sufficient evidence and into the reasons for the deficiency at the first trial. Petitioner will not be tried a second time unless that trial would be in the interest of justice under the principles of *Tateo* and *Jorn*. There is no reason to forbid the district court from making this inquiry, and the judgment of the court of appeals therefore should be affirmed.

ARGUMENT

THE DOUBLE JEOPARDY CLAUSE DOES NOT INVARIABLY PROHIBIT THE HOLDING OF A SECOND TRIAL IF THE COURT OF APPEALS CONCLUDES THAT THE INTERESTS OF JUSTICE REQUIRE SUCH A TRIAL AFTER A REVERSAL FOR INSUFFICENT EVIDENCE

A. A SECOND TRIAL ORDINARILY MAY BE HELD AFTER A CONVICTION IS REVERSED ON APPEAL

"At least since 1896, when *United States* v. *Ball*, 163 U.S. 662, was decided, it has been settled that [the Double Jeopardy Clause] imposes no limitations * * * upon the power to *retry* a defendant who has succeeded in getting his first conviction set aside." *North Carolina* v. *Pearce*, 395 U.S. 711, 719–720; emphasis in original. This principle is as old as the Double Jeopardy Clause itself.[4] It is "elementary in

[4] A statement of the rule appears in the congressional debates on the amendment. See 1 Annals of Congress 753 (1789); *United States* v. *Wilson*, 420 U.S. 332, 340–341.

our law" (*Forman* v. *United States*, 361 U.S. 416, 425) and a "well-established part of our constitutional jurisprudence" (*United States* v. *Tateo*, 377 U.S. 463, 465). Perhaps no other principle of double jeopardy law has been stated so often.[5] Its validity has never been seriously questioned.

Several rationales have been advanced for this rule. Some cases explained that a defendant who appeals from a conviction "waives" any double jeopardy objection to a second trial on the offense of which he was convicted. See, *e.g.*, *Trono* v. *United States*, 199 U.S. 521, 533; *Sapir* v. *United States*, 348 U.S. 373, 374 (Douglas, J., concurring). Other cases state that an appeal "continues" the jeopardy of the first trial. See, *e.g.*, *Jeffers* v. *United States*, No. 75–1805, decided June 16, 1977, plurality slip op. 14; *Price* v. *Georgia*, 398 U.S. 323, 326. Still others conclude that the propriety of a second trial "rests ultimately upon the premise that the original conviction has, at the defendant's behest, been wholly nullified and the slate wiped clean." *North Carolina* v. *Pearce*, *supra*, 395 U.S. at 721.

[5] See, *e.g.*, *Brown* v. *Ohio*, No. 75–6933, decided June 16, 1977, slip op. 4 n. 5; *Jeffers* v. *United States*, No. 75–1805, decided June 16, 1977, plurality slip op. 14; *Abney* v. *United States*, No. 75–6521, decided June 9, 1977, slip op. 14; *Ludwig* v. *Massachusetts*, 427 U.S. 618, 630–632; *United States* v. *Dinitz*, 424 U.S. 600, 610 n. 13; *Breed* v. *Jones*, 421 U.S. 519, 534; *Price* v. *Georgia*, 398 U.S. 323, 326, 329 n. 4; *United States* v. *Ewell*, 383 U.S. 116, 121–125; *Green* v. *United States*, 355 U.S. 184, 189; *Stroud* v. *United States*, 251 U.S. 15, 16–18; *Murphy* v. *Massachusetts*, 177 U.S. 155, 158–159.

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All of these explanations are open to criticism,[6] and although we do not entirely discount them, a "more satisfactory explanation" must be sought elsewhere. *Breed* v. *Jones,* 421 U.S. 519, 534; *United States* v. *Wilson,* 420 U.S. 332, 344 n. 11. The best explanation "lies in [an] analysis of the respective interests involved" (*Breed* v. *Jones, supra,* 421 U.S. 534); the practical justification for generally allowing a second trial after the first conviction has been reversed is simply that it is fairer to everyone involved. As the Court explained in *United States* v. *Tateo, supra,* 377 U.S. at 466:

> [O]f greater importance than the conceptual abstractions employed to explain the *Ball* principle are the implications of that principle for the sound administration of justice. Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction. From the standpoint of a defendant, it is at least doubtful that appellate courts would be as zealous as they

[6] The waiver analysis was largely rejected by *Green* v. *United States*, 355 U.S. 184, 191–198. Cf. *United States* v. *Dinitz*, *supra* (the propriety of a second trial after a defendant moves for a mistrial does not depend on "waiver"). The "continuing jeopardy" analysis has been rejected in other contexts. See *United States* v. *Wilson*, *supra*, 420 U.S. at 351–353. Finally, the "clean slate" analysis may be only a restatement of the waiver argument.

> now are in protecting against the effects of improprieties at the trial or pretrial stage if they knew that reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution. In reality, therefore, the practice of retrial serves defendants' rights as well as society's interests.

The question of retrial after reversal usually arises when a defendant whose factual guilt has been established by sufficient evidence asserts that, for some reason, the factfinding process was unfair or unreliable or that a pretrial error undermined his conviction. In these cases it is entirely reasonable to remand the case to give the defendant what he was denied before—a procedurally adequate trial. A second trial following a reversal of a conviction gives the accused what he asserted he was denied, and it does not offer the prosecutor a chance to obtain a more favorable verdict from a second factfinder after failing with the first. "The determination to allow reprosecution in these circumstances reflects the judgment that the defendant's double jeopardy interests, however defined, do not go so far as to compel society to so mobilize its decision-making resources that it will be prepared to assure the defendant a single proceeding free from harmful governmental or judicial error." *United States* v. *Jorn,* 400 U.S. 470, 484 (plurality opinion).[7]

[7] A second trial after conviction and reversal does not jeopardize the defendant's "valued right to have his trial completed by a particular tribunal" (*Wade* v. *Hunter*, 336 U.S. 684, 689) or deprive a defendant of his "option to go to the jury and, perhaps, end the

Petitioner contends, however, that the justifications for holding a second trial are inadequate when a defendant contends that the evidence was insufficient to support a conviction. When a motion for a judgment of acquittal is erroneously denied, petitioner argues, the defendant *is* deprived of his chance to end the dispute then and there with an acquittal. Moreover, at a second trial the prosecutor will have "another, more favorable opportunity to convict the accused" (*Gori* v. *United States,* 367 U.S. 364, 369) and will be able to try to "do better a second time" (*Brock* v. *North Carolina,* 344 U.S. 424, 429 (Frankfurter, J., concurring)). Petitioner contends that these were exactly the dangers against which the Double Jeopardy Clause was designed to protect, and that when a court of appeals concludes that the evidence was insufficient to support a conviction, it has no choice but to enter a final judgment of acquittal.

These arguments for distinguishing evidentiary insufficiency from legal errors are strong ones. For the reasons that follow, however, we do not believe that they justify the creation of a rigid rule invariably prohibiting second trials after reversals for insufficiency of the evidence.

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dispute then and there with an acquittal" (*United States* v. *Jorn*, *supra*, 400 U.S. at 484). This case went to the jury, which found petitioner guilty. The defendant in such cases has not been deprived of any options; there is no need to speculate about what the jury at the first trial would have done. The special problems that arise when a trial is terminated prior to verdict therefore do not pertain to the present case.

B. THIS COURT HAS ALLOWED SECOND TRIALS AFTER REVERSALS FOR INSUFFICIENCY OF THE EVIDENCE

Before the creation of the courts of appeals, certain criminal convictions could be appealed directly to this Court. It was this Court's practice, after concluding that the evidence of guilt was insufficient, to remand the case for a second trial. See, *e.g., Wiborg* v. *United States,* 163 U.S. 632; *Clyatt* v. *United States,* 197 U.S. 207.

This Court held in *Bryan* v. *United States,* 338 U.S. 552, that this practice comported with the Double Jeopardy Clause and was authorized by 28 U.S.C. 2106, which gives appellate courts the power to direct on remand the holding of any further proceedings that may be "just" and "appropriate." In *Bryan* a conviction had been reversed because the evidence was insufficient. This Court concluded that another trial should be held for several reasons: because the evidentiary question was very close, because the missing evidence could be supplied at a second trial, and because a "new trial was one of the remedies which petitioner sought" (338 U.S. at 560). It then rejected the argument that such a trial would be constitutionally impermissible, pointing out that the defendant "sought and obtained the reversal of his conviction" (*ibid.*), a circumstance that always had been deemed to remove any double jeopardy barrier to a second trial.

Bryan was a considered holding.[8] It has been reaffirmed several times. In *Yates* v. *United States,* 354 U.S. 298, 328, the Court, although concluding that it was just to acquit certain defendants against whom the evidence was insufficient, went on to point out that "we would no doubt be justified in refusing to order acquittal even where the evidence might be deemed palpably insufficient, particularly since petitioners have asked * * * for a new trial as well as for acquittal." In *Sapir* v. *United States, supra,* the Court ordered a defendant acquitted because of evidentiary insufficiency, but Mr. Justice Douglas noted in concurrence that the Double Jeopardy Clause would not invariably require such a disposition.[9]

In *Forman* v. *United States, supra,* the Court held that a new trial was appropriate even though no evi-

[8] Petitioner suggests that the double jeopardy issue received only "cursory" attention (Br. 8) because it was discussed in a single paragraph. Yet the extensive briefs of the parties had addressed the double jeopardy issue (see the briefs in No. 178, October Term, 1949: Pet. Br. 16–22, Resp. Br. 7–15, Pet. Reply Br. 2–4), and Mr. Justice Black addressed the question in a concurring opinion.

[9] The brief *per curiam* opinion in *Sapir* does not state the reason for requiring petitioner to be acquitted. The petition for certiorari in that case (Pet. No. 534, October Term, 1954, p. 9) conceded that under *Bryan* the Double Jeopardy Clause did not always forbid a second trial after a reversal for insufficient evidence. Petitioner argued, however, that the court of appeals had considered evidence outside the record in deciding that a second trial should be held (Pet. 7), that the government's request for a new trial was untimely (Pet. 7–9), that petitioner had not asked for a new trial (Pet. 9–10), and that a new trial would be unjust because the prosecutor had a full opportunity to present evidence at the first trial (Pet. 10–12).

dence at all supported the theory on which the case had been submitted to the jury. The Court pointed out that there was ample evidence to convict Forman under a correct theory, that a "new trial * * * was one of petitioner's remedies" (361 U.S. at 425), and that even though Forman had requested an acquittal "the Court of Appeals has full power to go beyond the particular relief sought" (*ibid.*). The Court has continued to cite *Bryan* favorably. See *North Carolina* v. *Pearce, supra,* 395 U.S. at 720, 721 n. 18 ("[w]e think those decisions are entirely sound, and we decline to depart from the concept they reflect"); *United States* v. *Jorn,* 400 U.S. at 492–493 n. 3 (Stewart, J., dissenting).

Bryan has not, however, escaped criticism. Several courts have limited *Bryan* to cases in which the defendant filed a motion for a new trial.[10] Other courts

[10] See, *e.g.*, *United States* v. *Barker*, 558 F. 2d 899 (C.A. 8); *Greene* v. *Massey*, 546 F. 2d 51 (C.A. 5), certiorari granted, June 20, 1977 (No. 76–6617); *United States* v. *Robinson*, 545 F. 2d 301, 305 n. 5 (C.A. 2). See also 2 Wright, *Federal Practice and Procedure: Criminal* § 740 (1969).

Although *Forman* suggested that *Sapir* had established this distinction, that statement may have been based on a misreading of the issues presented in *Sapir*. See note 9, *supra*. In any event, we agree with Mr. Justice Harlan, concurring in *Forman* (361 U.S. at 428), that "the right of an appellate court to order a new trial does not turn on the relief requested by the defendant, and the *Sapir* case does not suggest such a distinction." The motion for a judgment of acquittal and the motion for a new trial serve different functions; a defendant who seeks an acquittal argues that the evidence was absolutely insufficient to convict him, whereas a defendant may ask for a new trial because of trial error or because he seeks to persuade the district court to grant a new

have adopted the approach of Mr. Justice Black in *Bryan* by concluding that a second trial could be held only if there are equitable reasons for doing so.[11] Some courts and commentators have called for the overruling of *Bryan*.[12]

These views are based on the arguments we have outlined at pages 15–16, *supra,* and the essential belief that the prosecution, having failed to introduce sufficient evidence at the first trial, should not be allowed a second opportunity to convict. We, too, believe that these arguments suggest that second trials should be allowed only with caution after a conviction has been reversed for insufficient evidence; we do not, however, believe that a distinction between evidentiary and procedural reversals can or should be drawn that would make second trials uniformly forbidden in the former case and uniformly permitted in the latter.

trial in the interests of justice even though the evidence is marginally sufficient. Under 28 U.S.C. 2106 an appellate court may grant whatever relief is just and appropriate, and "the Court of Appeals has full power to go beyond the particular relief sought" (*Forman*, *supra*, 361 U.S. at 425). The court should be empowered to grant an acquittal even though the defendant asked only for a new trial, and it should be empowered to grant a new trial even if the defendant asked only for an acquittal. A defendant entitled to an acquittal should not be denied that relief just because he also requests a new trial in the event that an appellate court should conclude that an acquittal would be unjustified. The idea that the appellate court is confined to the relief the defendant requested could be supported only on a rigid view of "waiver" of double jeopardy interests that was rejected in *United States* v. *Dinitz*, *supra*. See also *United States* v. *Wiley*, 517 F. 2d 1212, 1217 n. 24 (C.A. D.C.).

[11] See, *e.g.*, *United States* v. *Wiley*, *supra*, 517 F. 2d at 1219–1221 (new trials should be allowed when circumstances beyond the prosecutor's control, including legal error at trial, prevented the introduction of sufficient evidence); *United States* v. *Howard*, 432 F. 2d 1188, 1191 (C.A. 9) (opinion of Ely and Hufstedler, JJ.); *United States* v. *Steinberg*, 525 F. 2d 1126, 1134–1135 (C.A. 2) (Friendly, J., concurring)

[12] See, *e.g.*, *Sumpter* v. *DeGroot*, 552 F. 2d 1206, 1209–1213 (C.A. 7). See also Thompson, *Reversals for Insufficient Evidence: The Emerging Doctrine of Appellate Acquittal*, 8 Ind. L. Rev. 497 (1975); Comment, *Double Jeopardy: A New Trial After Appellate Reversal for Insufficient Evidence*, 31 U. Chi. L. Rev. 365 (1964).

C. THERE IS NO BRIGHT LINE BETWEEN INSUFFICIENCY OF EVIDENCE AND LEGAL ERROR AT TRIAL

The legal standard that the court of appeals applies in passing on evidentiary arguments is a source of difficult questions. "[T]he verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it." *Glasser* v. *United States,* 315 U.S. 60, 80. What evidence is "substantial" is difficult to state in the abstract, and the sufficiency of the evidence depends upon the legal definition of the offense. The decision of a court of appeals to reverse a conviction because of "insufficient evidence" rarely involves only a conclusion that proof of an essential fact is missing. In the pages that follow, we discuss some of the reasons that make it impossible to draw any inflexible line between legal and evidentiary problems.

1. Legal and factual issues may be inextricably intertwined

The prosecutor's decision to introduce particular evidence at trial is guided by his understanding of

legal rules. There are many cases in which the prosecutor, the defendant, and the court may have some uncertainty about what the evidence must show in order to be sufficient. For example, federal weapons offenses require proof of an interstate nexus. But it is not always easy to predict which offenses require what proof of interstate travel of weapons or their owners. Compare *United States* v. *Bass,* 404 U.S. 336, with *Scarborough* v. *United States,* No. 75–1344, decided June 6, 1977.

The failure of a prosecutor to introduce particular proof of a sufficient interstate nexus may reflect nothing other than a legal error—shared by the district court—about what the offense involves. The proof submitted to the jury may be sufficient to establish every element of the offense defined by the court's instructions, yet an appellate court could hold that essential evidence was missing. Is this a legal error in the charge to the jury, or is it a factual deficiency amounting to insufficient evidence?

Other problems arise when Congress or the common law provides that one fact may be inferred from another. Inferences are common in criminal trials; intent usually is inferred from objective facts, knowledge is inferred from circumstances, and other elements of the crime also must be proved indirectly. Yet all inferences present problems not only of constitutionality (see *Barnes* v. *United States,* 412 U.S. 837) but also of the adequacy of the proof. In *Leary* v. *United States,* 395 U.S. 6, the Court held that a particular

statutory inference was unconstitutional; with the inference removed, the evidence at the trial was insufficient. But relying on the inference in the first place was entirely a legal error, and a second trial was appropriate if the evidence could be supplied in a proper way.[13]

Take another example. An indictment charges a single conspiracy, and the defendant contends that the evidence at trial showed multiple conspiracies. Is this variance, if established, a "failure of proof," or is it a legal error in either (a) drafting the indictment, or (b) introducing *too much* evidence? See *United States* v. *Bertolotti,* 529 F.2d 149, 154, 160 (C.A. 2). Suppose, for any number of reasons, that the court of appeals is convinced that the defendant committed a crime, but not the one charged in the indictment; is such a case a "failure of proof" or an error in deciding what legal theory to put forth in the indictment?

In many cases the prosecutor introduces proof that is more than sufficient to meet the *Glasser* standard,

[13] Similarly, suppose there is a question whether the factfinder may "notice" a particular fact. There may be a question whether the name of a national bank is enough to prove that it is in fact a national bank for purposes of 18 U.S.C. 2113, or whether a jury may notice that lines of the American Telephone and Telegraph Co. cross state borders. In a state prosecution the question arose whether the jury could notice that the defendant, who was present in court, was female (see *Sumpter* v. *DeGroote, supra*). Often the prosecutor fails to offer proof of such things only because he believes (perhaps incorrectly) that the factfinder may take notice of the obvious. It is possible to call these kinds of deficiency "failures of proof," but it would be just as accurate to call them "mistakes of law" shared by the prosecutor and the court.

but the court of appeals later concludes that some portion of that proof should have been excluded—for example, because it was hearsay. The prosecutor may have relied on the district court's legal error in admitting the evidence and, because of that reliance, failed to offer other, admissible evidence that would have been cumulative. In cases of this sort sufficient evidence was admitted in fact, and a second trial should be permitted so that admissible evidence may be substituted for the inadmissible evidence.

2. Even genuine deficiencies in the evidence may be attributable to the defendant or to legal error

The cases we have discussed above are ones in which the evidence submitted to the jury is sufficient to allow the jury to find all of the elements of the offense defined in the court's charge, yet an appellate court later concludes that it was "really" insufficient under a correct legal standard. We believe that all of these cases should be treated, under the standard of *Ball* and *Tateo,* just like any other legal error. A second trial should be permitted if the factual defect can be corrected.

The argument against holding a second trial is strongest when the evidence at trial is insufficient even under the view of the law taken by the trial court. Here, too, however, it is not always simple to isolate factual insufficiency from legal error.

In some cases the prosecutor introduces more than enough evidence to establish the commission of an of-

fense, but the defendant induces the court to give a charge to the jury erroneously requiring the jury to find facts that have not been proved at trial. For example, in *Forman* v. *United States, supra,* the prosecutor introduced evidence that established that Forman and Seijas conspired to evade income taxes. The defendants persuaded the district court that the prosecution was barred by the statute of limitations unless they had entered into a second conspiracy to conceal the first, and the court accordingly instructed the jury that it could convict only if it found a "concealment" conspiracy. That amounted to the direction of a verdict of acquittal, since there was no evidence that there had been such a conspiracy.

The jury convicted the defendants nevertheless. The evidence at the first trial was palpably insufficient to prove the offense that the district court defined for the jury, and the district court (if it believed its own erroneous legal theory) should have entered judgments of acquittal. This Court had no difficulty in concluding, however, that a new trial was just and appropriate under 28 U.S.C. 2106, and consistent with the Double Jeopardy Clause.[14]

[14] As Mr. Justice Whittaker explained, concurring, 361 U.S. at 429, the defendant, "having asked [for] and obtained an erroneous but far more favorable charge than he was entitled to, certainly invited the error, benefited by it, and surely may not be heard to attack it as prejudicial to him" and then assert it as a reason why he may not be tried a second time.

Forman was an extreme case.[15] Other, more common, procedural problems may lead to a failure of proof. A ruling by the trial court may erroneously preclude the introduction of essential probative evidence. The court may, for example, improperly suppress evidence on Fourth Amendment grounds or erroneously conclude that a particular statement does not fall within an exception to the hearsay rule. If the court then grants a mid-trial judgment of acquittal, the Double Jeopardy Clause would bar a second trial.[16] But if the case goes to the jury, and the jury convicts the defendant, the defendant should not thereafter be able to plead the legal error as a reason why he may not be retried. The defendant is not entitled to a "windfall acquittal," because he "acquire[s] no vested right [to] that error."

[15] See also *United States* v. *Cioffi*, 487 F. 2d 492 (C.A. 2), certiorari denied *sub nom. Ciuzio* v. *United States*, 416 U.S. 995, in which the court withdrew from the jury the authority to convict on a legal theory supported by the evidence and submitted the case, instead, on a theory not supported by the evidence. The court of appeals found (487 F. 2d at 501) "no tenable distinction between a case like this where defendants have procured a reversal because the judge submitted the indictment to the jury on a wrong theory and one where they procured a reversal because the judge submitted a defective indictment, as in the classic case of *United States* v. *Ball*, 163 U.S. 662, 672 * * *." Mr. Justice Brennan, dissenting from the denial of certiorari, recognized (416 U.S. at 997) that it was proper to remand for a second trial "although the Government's evidence * * * may have been insufficient * * *." (He argued, however, that there was an implied acquittal on the charge withdrawn from the jury.)

[16] See *United States* v. *Martin Linen Supply Co.*, No. 76–120, decided April 4, 1977; *United States* v. *Fay*, 553 F. 2d 1247 (C.A. 10) (erroneous grant of suppression motion in mid-trial, followed by the entry of a judgment of acquittal).

United States v. *Howard*, 432 F. 2d 1188, 1190 (C.A. 9) (opinion of Madden, J.).[17]

In many cases the deficiency in the prosecution's case may be attributable to the defendant. See, *e.g.*, *United States* v. *Smith*, 437 F. 2d 538 (C.A. 6), in which the prosecution was unable to overcome an insanity defense because the defense had given inadequate notice and the defendant refused to submit to a psychiatric examination. Although the court of appeals reversed the conviction for want of sufficient evidence of sanity, it was both just and constitutionally permissible to remand the case for a second trial at which the prosecution could supply the evidence that was missing at the first trial only because of the defendant's tactics.[18]

[17] In *Howard* the district court, at the urging of the defendant, denied the prosecution the benefit of a statutory presumption, but the jury nevertheless convicted. The court of appeals remanded the case for a second trial despite the fact that the evidence was insufficient without the assistance of the presumption. As Judges Ely and Hufstedler explained in a separate opinion (432 F. 2d at 1191), "the prosecution, through no fault of its own, had been deprived of an advantage to which it was entitled * * *. In these circumstances, its case has not been fully developed, and it cannot be faulted for the deficiency of proof which requires reversal."

[18] See *United States* v. *Wiley*, *supra*, 517 F. 2d at 1221, in which the court of appeals, although critical of *Bryan*, identified situations in which a second trial should be allowed despite insufficient evidence at the first trial: "the Government may [establish the propriety of a second trial] by pointing to unusual circumstances which denied it a fair chance to prove its case. * * * Retrials would also appear permissible, for example, where the Government was prevented from introducing sufficient evidence by an erroneous ruling of the trial judge, improperly excluding or suppressing Government evidence or denying a reasonable motion to reopen its case or to obtain a brief continuance to supply additional evidence."

In all of the cases we have discussed above, a legal error by the court, by the prosecutor, by the defense, or by some combination of them produced a defect in the evidence. Petitioner argues that these and other problems may be put to one side, because in the present case no legal error was responsible for the deficiency in the evidence. This is not necessarily an accurate characterization of this case. The court of appeals reversed petitioner's conviction principally because the expert witnesses for the prosecution did not give their opinions on the ultimate issue of petitioner's sanity (see A. 157). Whether expert witnesses are *required* to testify on the ultimate issue is entirely a legal question, and the defect in the evidence therefore may be related to a legal assumption, shared by the prosecutor and by the district court, that such evidence is unnecessary.[19]

[19] Fed. R. Evid. 704 provides that expert testimony is not "objectionable" because it "embraces an ultimate issue to be decided by the trier of fact." But this is a new rule in federal practice; older cases forbade such testimony. See McCormick, *Handbook of the Law of Evidence* § 12 (Cleary ed. 1972). The jury usually is allowed to infer from the expert's background testimony whether the defendant's mental disease significantly diminished his capacity to obey the law, and we have not discovered any other case holding or implying that the expert witnesses must address this question directly. The court's holding in this regard, to the extent it makes opinion testimony on the ultimate issue indispensible, therefore is a departure from precedent.

Moreover, the court of appeals' holding in this regard appears to take a different approach to insanity issues than does *United States* v. *Dube*, 520 F. 2d 250 (C.A. 1), which held that the evidence of a defendant's sanity may be sufficient even though the prosecution presents no expert witnesses; the *Dube* court concluded that the jury may choose to discount the analysis of the defendant's experts, and that information supplied by lay witnesses may be ample to allow the jury to conclude that the defendant was sane at the time of the crime. *Dube* thus holds that in some cases neither expert witnesses nor testimony on the ultimate issues is necessary.

If the court of appeals in the present case had followed the analysis of *Dube*, it probably would have affirmed petitioner's conviction. This illustrates, we believe, that the court's "evidentiary insufficiency" holding had strong procedural overtones. Any deficiency in the evidence at trial may have been caused by the prosecutor's beliefs about the types of proof that were required. (Although we have not presented this apparent conflict among the courts of appeals as a question for resolution by this Court, we do not thereby concede that the court of appeals resolved the issue correctly in the present case.)

3. An inflexible rule barring retrials would deter appellate courts from giving defendants the benefit of the doubt in close cases

We do not believe that even relatively uncluttered questions of fact can be analyzed in a way that would isolate certain categories of cases in which retrial is never permitted. This Court explained in *United States* v. *Tateo, supra,* 377 U.S. at 466, that "it is at least doubtful that appellate courts would be as zealous as they now are in protecting against the effects of improprieties at * * * trial * * * if they knew that reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution." That observation applies to cases in which the evidence may be insufficient no less than to cases in which the trial may have been infected by prosecutorial error.

There is no simple device for separating sufficient evidence from insufficient evidence. There are many

cases in which the district judge and a unanimous jury are convinced of the defendant's guilt, yet the court of appeals is skeptical. It is not unusual for a court of appeals to conclude that the evidence of guilt is sufficient "although only by a hair's breadth" (*United States* v. *Lefkowitz*, 284 F. 2d 310, 315 (C.A. 2), or that it is almost (but not quite) sufficient, or that it is technically deficient in an easily remediable way (*e.g., Cook* v. *United States*, 362 F. 2d 548, 549 (C.A. 9). When the evidence is on the borderline between sufficiency and insufficiency, a court might hesitate to declare the evidence deficient if it knew that such a declaration must bring the prosecution to an end.

As a practical matter, it may be essential to allow appellate courts the option of remanding for a second trial in cases where the sufficiency of the evidence is doubtful. When the reviewing court perceives the issue of guilt to be close, a rule forbidding it to remand for another trial would provide substantial incentive to resolve difficult issues in favor of affirmance, lest the guilty go free. The rule allowing retrials permits appellate courts to resolve uncertainties in favor of the defendant without committing themselves to saying the final word on the issue of guilt or innocence.

A remand for a second trial is, in at least some cases, the remedy most consistent with an honest appraisal of the state of the evidence: neither strong

enough to permit the defendant to be convicted, nor weak enough to say with assurance that the evidence does not satisfy the *Glasser* standard. When these difficult cases arise, a remand for a second trial may be by far the fairest solution for all concerned.[20]

This may be such a case. The trial judge and the jury were persuaded of petitioner's sanity. Two expert witnesses testified for the prosecution that petitioner knew what he was doing and had substantial control over his actions, but they did not explicitly state that he could conform his conduct to the requirements of the law on the day in question. The court of appeals observed that at least one lay witness gave testimony

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[20] We do not imply that an appellate court has an essentially unfettered power (similar to that granted to the district courts by Fed. R. Crim. P. 33) to grant new trials in the interests of justice despite the sufficiency of the evidence. *Glasser* provides the proper standard for appellate review. But wherever the line is drawn between sufficient and insufficient evidence, there will be cases very near it on either side, and it is in these difficult cases that the option of ordering a new trial is necesary to facilitate fair resolution.

Moreover, some state appellate courts possess the power to award new trials in the interest of justice despite the sufficiency of the evidence. *Greene* v. *Massey*, *supra*, may involve the exercise of that power by a state court (see *Sosa* v. *State*, 215 So. 2d 736, 737 Fla. Sup. Ct.). In these cases a defendant probably should have the right to insist upon a resolution of the sufficiency question if he would prefer to let the conviction (and the known sentence) stand rather than to subject himself to a second trial; a motion for a new trial reveals that the defendant does not insist upon a final disposition. But once a defendant has opened up the possibility of a remand for a new trial "in the interests of justice," he should not be able to invoke a double jeopardy bar to the trial he requested. See also note 10, *supra*.

establishing that petitioner behaved normally for extended periods, but that this testimony was undermined by an incident related on cross-examination (A. 157). In these circumstances, the court concluded, the evidence had not "effectively" (*ibid.*) overcome the *prima facie* showing of insanity.

The court of appeals' discussion strongly suggests that it found this to be a difficult case, in which it weighed not only the particular testimony but also its "effectiveness." Cases of this sort are excellent examples of cases in which a second trial is a solution preferable to either affirmance of the conviction or outright acquittal.

4. Evidence relating to affirming defenses presents problems unlike those that arise when the proof does not establish one of the elements of the offense

Part of the rationale for allowing a second trial after a conviction has been reversed is that "the Double Jeopardy Clause does not guarantee a defendant that the Government will be prepared, in all circumstances, to vindicate the social interest in law enforcement through the vehicle of a single proceeding for a given offense." *United States* v. *Jorn, supra,* 400 U.S. at 483–484 (plurality opinion). "Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial." *United States* v. *Tateo, supra,* 377 U.S. at 466.

Many sufficiency-of-the-evidence problems arise when the prosecutor neglects or is unable to prove an

element of the offense. In such cases the appellate court is not confronted with a defendant "whose guilt is clear." The failure to prove an element of the offense beyond a reasonable doubt is a constitutional defect (see *In re Winship,* 397 U.S. 358), and when the prosecutor has simply neglected (or been unable) to prove an essential element of the offense, the defendant has a strong argument for an absolute acquittal whether or not the jury has convicted him. But the problem is more difficult where, as here, the prosecutor established all of the elements of the offense beyond a reasonable doubt, and the question on appeal is whether the prosecutor also adequately overcame an affirmative defense.

Petitioner has conceded that he robbed the bank (A. 158). This case therefore involves a defendant "whose guilt is clear" on the statutory elements of the offense. Since the burdens of proving or overcoming affirmative defenses are constitutionally distinct from the prosecutor's burden to prove the elements of the offense,[21] only prudential questions are involved in considering the sufficiency of evidence to overcome an affirmative defense. This Court has held that in federal cases the prosecutor must show beyond a reasonable doubt that the defendant was sane at the time of the offense (*Davis* v. *United States,* 160 U.S. 469); in that sense, sanity is an element of the offense. But the Constitution would be satisfied if Congress put the

[21] See *Patterson* v. *New York*, No. 75–1861, decided June 17, 1977; *Speiser* v. *Randall*, 357 U.S. 513, 523.

burden on defendants to establish insanity (*Leland* v. *Oregon,* 343 U.S. 790; as a constitutional matter, then, sanity and factual guilt are distinct.

Affirmative defenses often take a case well afield from the question whether the defendant committed the offense charged. In the present case, for example, the psychiatrists explored petitioner's childhood development and his ambivalent feelings toward his parents and siblings (e.g., A. 64–69, 77–82, 88). The prosecutor, who must be fully prepared to prove the elements of the offense charged in the indictment, will not always be prepared to overcome whatever questions may be raised by affirmative defenses.

When the elements of the offense have been established beyond question—and when the evidence concerning the affirmative defense is sufficiently strong to persuade a jury to convict and to persuade the district court to deny a motion for a judgment of acquittal—it is not unfair to permit a second trial to be held if an appellate court should later conclude that the evidence was weaker than the district court thought it was. Cases involving failure of proof only on an affirmative defense may be paradigms of cases in which society has an important interest in convicting those who are in fact guilty.

Moreover, when the sufficiency of the proof is questionable only with respect to an affirmative defense such as insanity, it is especially important in difficult cases that courts have the "safety valve" of remanding for a second trial rather than resolving uncertain-

ties in favor of either acquittal or affirmance. That courts generally regard such a disposition as "just" and "appropriate" reflects both (1) the fact that there is little doubt that the defendant committed the acts constituting the crime and (2) the fact that questions of mental competency present such a "Serbonian Bog" [22] that an appellate court cannot be certain that its own evaluation of the defendant's state of mind rests on footing more sure than the jury's evaluation.[23] The resolution of close cases involving imponderables like sanity would not be facilitated by an inflexible rule denying appellate courts the middle ground of ordering a second trial.

The difference between affirmative defenses and other factual questions is illustrated by the fact that some federal courts and many state courts hold bifurcated trials. If a bifurcated trial had been held in the present case, the jury would have found petitioner guilty of the offense charged, and that verdict would stand unimpeached. The jury then would have rejected petitioner's insanity defense; the court of

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[22] *United States* v. *Bass*, 490 F. 2d 846, 851 (C.A. 5).

[23] See, *e.g.*, *Amador Beltran* v. *United States*, 302 F. 2d 48 (C.A. 1); *United States* v. *Wilson*, 399 F. 2d 459, 464 (C.A. 4) (Sobeloff, J., dissenting); *United States* v. *Bass*, *supra*; *United States* v. *Parks*, 460 F. 2d 736 (C.A. 5); *Watkins* v. *United States*, 409 F. 2d 1382 (C.A. 5), certiorari denied, 396 U.S. 921; *United States* v. *Dunn*, 299 F. 2d 548 (C.A. 6); *United States* v. *Barfield*, 405 F. 2d 1209 (C.A. 6); *United States* v. *Smith*, 437 F. 2d 538 (C.A. 6); *United States* v. *McGraw*, 515 F. 2d 758 (C.A. 9); *Julian* v. *United States*, 391 F. 2d 279 (C.A. 9); *Rucker* v. *United States*, 288 F. 2d 146 (C.A. D.C.); *Hopkins* v. *United States*, 275 F. 2d 155 (C.A. D.C.); *Douglas* v. *United States*, 239 F. 2d 52 (C.A. D.C.).

appeals would have reversed only that discrete portion of the jury's findings. If the initial bifurcation would not have violated the Double Jeopardy Clause, there is no convincing reason why further proceedings on the insanity question alone would do so, since the finding of factual guilt would endure.[24] This Court has upheld separate and limited retrials on the issue of disposition (see *Brady* v. *Maryland*, 373 U.S. 83, 88–91), and we believe that further proceedings seeking to achieve the correct resolution of issues raised by an affirmative defense are not necessarily forbidden by the Double Jeopardy Clause.[25]

[24] See *United States* v. *Alvarez*, 519 F. 2d 1036, 1049 (C.A. 3), another insanity case, in which the court of appeals explained that "the double jeopardy clause of the fifth amendment does not bar a retrial after a reversal on appeal so long as there was sufficient evidence persented in the first trial to establish a *prima facie* case (footnote omitted). *Alvarez* permitted a second trial ofter reversal because of defects in the proof of sanity during the second portion of a bifurcated trial. The court concluded, in the exercise of its powers under 28 U.S.C. 2106, that the second trial should involve both the elements of the offense and the issue of sanity, a conclusion that appears to conflict with the practice in the District of Columbia, where a retrial would be limited to the sanity issues. Compare *United States* v. *Wright*, 511 F. 2d 1311 (C.A. D.C.), with *Whalem* v. *United States*, 346 F. 2d 812 (C.A. D.C.). It is unnecessary in the present case to consider the issues that would be presented at the second trial of petitioner, however, in light of his concession that he robbed the bank and the fact that the court of appeals did not specify whether the retrial, if held, should be limited to the isue of sanity. It apparently left that question to be addressed in the first instance by the district court.

[25] Cf. *McGautha* v. *California*, 402 U.S. 183, 208–220, which holds that the Due Process Clause neither requires nor prohibits bifurcated penalty trials.

D. APPELLATE COURTS SHOULD BE PERMITTED TO REQUIRE OR ALLOW SECOND TRIALS WHEN THAT COURSE IS JUST AND REASONABLE

We have discussed the reasons why it is difficult, if not impossible, neatly to categorize the many reasons that may require the reversal of a conviction. Consequently, there is no simple test that would separate cases in which a retrial should be permitted from one in which it should not. We agree with petitioner that if the prosecutor, after a full and fair opportunity to do so, fails to introduce evidence to make out one or more elements of the offense, that should be the end of the case. If the jury nevertheless convicts, the court of appeals should reverse and remand for the entry of a judgment of acquittal.

But cases are not always that simple. When legal and factual problems are intertwined, or when the evidence of guilt is neither obviously sufficient nor obviously deficient, or when legal error prevents the prosecutor from having a full oportunity to present evidence, or when the evidentiary problem concerns only an affirmative defense, it is essential that the courts have the discretion to take a middle ground between acquittal and affirmance.

The appellate courts have exercised this discretion with restraint, concluding that such trials are just and appropriate under 28 U.S.C. 2106 only when one or more of these circumstances occurs. See, *e.g.*, *United States* v. *Wiley*, 517 F. 2d 1212 (C.A. D.C.); *United States* v. *Howard*, 432 F. 2d 1188, 1191 (C.A. 9)

(opinion of Ely and Hufstedler, JJ.). We believe that these cases correctly balance the competing interests of the defendant and the prosecution in concluding that no inflexible rule either forbidding or allowing second trials should be established. A defendant's legitimate double jeopardy interests, as well as his interests in fair treatment, are fully protected by a rule prohibiting retrial when the prosecution inexcusably fails to prove one of the elements of a *prima facie* case and permitting retrial in other situations. This is the aproach that has evolved in the courts of appeals in recent years, and we believe that it is sound.[26]

The disposition of petitioner's case by the court of appeals here is consistent with this approach. The court did not mechanically remand for a new trial; it remanded the case, instead, to permit the prosecutor to outline for the district court what evidence he could offer at a second trial. Even if the prosecutor offers sufficient evidence of sanity, the district court need not allow a second trial if the prosecution had a full

[26] In addition to the cases cited in note 11, *supra*, see *United States* v. *Smith*, 437 F. 2d 538, 542 (C.A. 6); *Dotson* v. *United States*, 440 F. 2d 1224 (C.A. 10); *United States* v. *Snider*, 502 F. 2d 645, 656 (C.A. 4); *United States* v. *Koonce*, 485 F. 2d 374 (C.A. 8). Although these courts have not all formulated the principle in the same way we have expressed it here, we believe that we have distilled the essence of their approach. (To the extent these and other courts find significance in the presence or absence of a motion by the defendant for a new trial, we disagree with their approach for the reasons stated in note 10, *supra*.)

and fair opportunity to develop its case at the first trial (A. 158). In other words, the court of appeals made the propriety of a second trial depend upon a careful balancing of the equities.

The terms of the remand are just and appropriate in this case. See also *Bryan* v. *United States, supra,* 338 U.S. at 560 (Black, J., concurring). If the evidence at the first trial was defective only because of an unexplained prosecutorial lapse or because sufficient evidence was unavailable, this case will come to an end without a second trial. If the deficiency had some other cause, there is no compelling reason why petitioner should not be retried.[27]

[27] The court of appeals did not identify with particularity the deficiencies in the evidence at petitioner's trial (see pages 28, 31–32 and note 19, *supra*), and so it is not possible to predict with confidence whether the prosecutor will be able to prove facts sufficient to satisfy the court of appeals. The prosecutor can offer to ask the expert witnesses the questions that the court of appeals thought were central: whether petitioner "knew" the wrongfulness of his act and whether his mental illness "render[ed] him substantially incapable of conforming his conduct to the requirements of the law" (A. 156). The district court then would be required to decide whether affirmative answers to the first question and negative answers to the second would provide sufficient evidence and, if so, whether it was an excusable mistake for the prosecutor not to have asked those questions at the first trial. If the court found the prosecutor's neglect to be justifiable—perhaps because based on the reasonable, albeit mistaken, belief that such questioning was unnecessary—the court could properly set the case for another trial.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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OCTOBER 1977.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-6528

DAVID WAYNE BURKS,

Petitioner,

v.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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The argument for the United States is fairly summed up in its brief at 11:

> "(W)here the defect at the first trial is based upon a mistake of law rather than upon simple factual insufficiency, or where the prosecutor cannot reasonably be faulted for any factual insufficiency, the interest in accurate resolution of criminal charges outweighs the interest of defendent in avoiding a second trial after conviction at the first."

ARGUMENT

1. THE DEFECT AT THE FIRST TRIAL IS NOT BASED UPON "A MISTAKE OF LAW RATHER THAN SIMPLE FACTUAL INSUFFICIENCY . . ."

Whatever the merits of the "bright line" theory of the United States (Brief 21-36) in other contexts,[1] there is a "bright line" in the present case between insufficiency of the evidence and legal error at the trial. The Government argues:

> "The court of appeals reversed petitioner's conviction principally because the expert witnesses for the prosecution did not give their opinions on the ultimate issue of petitioner's sanity." At 10.

In *United States v. Smith*, 404 F.2d (1968), the Sixth Circuit established a new standard for determining whether at the time of the offense the defendent was capable of criminal responsibility. The standard was well known to the United States.[2] The weight to be

[1] a) Valid misunderstanding of legal rules (example: necessity of interstate nexus in federal firearms offenses, reliance upon statutory inferences later shown to be unconstitutional, variance between indictment and proof in conspiracy cases, scope of judicial notice of essential facts such as sex, national bank charter, etc.).

b) Errors attributable to defendent (example: erroneous charge requested by defendent; refusal of defendent to take mid-trial psychiatric exam).

c) Exclusion of necessary proof by the court.

[2] The order for psychiatric examination set out the three questions required to be answered by the *Smith* rule of the Sixth Circuit. A.7. The defendent at arraignment had pleaded "not quilty by reason of insanity." A.6.

given lay testimony had been discussed by the Sixth Circuit in *United States v. Smith*, 437 F.2d 538 (1970).

There were no evidentiary or substantive surprises, simply a failure by the Government to produce necessary evidence. The Sixth Circuit reversed because the Government failed to produce evidence to satisfy the *Smith* criteria, not simply because the expert witnesses did not give their opinions on the ultimate issue of insanity.

2. THIS IS NOT AN INSTANCE WHERE "THE PROSECUTOR CANNOT REASONABLY BE FAULTED FOR ANY FACTUAL INSUFFICIENCY . . ."

This is the second reason advanced by the United States for granting a new trial. But any reasonable prosecutor would have asked his expert witnesses questions which proved or disproved the ultimate fact. Because there was such a lack of questions by the prosecutor, the ultimate facts were never answered by witnesses called by the United States. The prosecutor was either negligent in not asking the *Smith* questions or shrewd in not asking them because he knew the answers would be unfavorable.[3]

[3] Petitioner is not asserting that these questions need be asked verbatim. The proof on the insanity issue must be directed to the criteria adopted in *Smith*, however.

CONCLUSION

The reversal below was for a failure of proof not attributable to any mistake of law. The prosecutor inexplicably failed to elicit proof of the ultimate issue from the two expert witnesses he called. The court of appeals found the other evidence insufficient. The present case is not within that class of cases in which the United States presents some rationale for a limited right to retrial in insufficiency of the evidence reversals. The present case falls within the general class of cases in which the reversal on appeal was because the evidence was simply insufficient.

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